Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

COLUMBIA IRON & METAL CO.,
Petitioner,

v.

LINCOLN ELECTRIC COMPANY, AND
PROFILE GRINDING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 15, 2009

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QUESTIONS PRESENTED

1. Where a jury is instructed on two different bases for tolling the statute of limitations, one of which is clearly erroneous and the other of which is deemed acceptable, may the verdict stand because the jury "could have" followed the acceptable instruction even though the court is unable to find that the jury did not instead follow only the erroneous instruction?

2. May a trial court omit a Rule 23(c)(2)(B) notice to absent class members in a Rule 23(b)(3) class action and thereafter substitute a partial settlement notice under Rule 23(e)(1)(B) without including the admonition specified in Rule 23(c)(2)(B) that a subsequent judgment in the continuing litigation against the non-settling defendants would be binding on the class members?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant–Appellant and Petitioner: Columbia Iron & Metal Co.

Plaintiffs-Appellees and Respondents: Lincoln Electric Company and Profile Grinding, Inc. as representatives of a class of generators of ferrous scrap in Cuyahoga, Lake, Lorain, Medina, Summit, Stark and Ashtabula counties in the State of Ohio from December 1992 to March 2000.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of Petitioner Columbia Iron & Metal Co. is Columbia National Group, Inc. Neither corporation is publicly held, and no publicly held company owns 10% or more of either corporation's stock.

TABLE OF CONTENTS

Questions Presented i

Rule 14.1(b) Statement ii

Corporate Disclosure Statement iii

Table of Contents iv

Table of Authorities vii

Petition for a Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statutory Provisions and Rule Involved 1

Statement of the Case 2

A. Class Certification and Notice 2

B. Jury Instructions on Limitations Periods .. 3

C. Damages Evidence and Verdict 6

D. Judgment Entry 7

E. Appeal 8

Reasons for Granting the Petition 8

I. THE SIXTH CIRCUIT'S NEW STANDARD FOR AFFIRMING AN AMBIGUOUS JURY VERDICT DEPARTS FROM ITS OWN PRIOR STANDARD, CONFLICTS WITH THE STANDARD ADOPTED IN OTHER CIRCUITS AND CONTRADICTS THE DECISIONS OF THIS COURT 13

A. The Sixth Circuit's New Standard, that a Verdict Can Stand Where the Jury Was Instructed on Alternate Theories and May Have Followed Either a Correct or an Erroneous Instruction, Will Permit Juries to Rely upon Clear Errors of Law 14

B. The Sixth Circuit's Standard Will Allow Reviewing Courts to Affirm Verdicts without Examining the Errors upon which the Verdicts May Be Based 17

II. THE SIXTH CIRCUIT HAS ELIMINATED THE REQUIREMENT OF CIVIL RULE 23(c)(2)(B) FOR NOTICE TO A CERTIFIED RULE 23(b)(3) CLASS OF THE BINDING EFFECT OF A CLASS JUDGMENT. 18

III. THE SIXTH CIRCUIT PERMITS A FINAL JUDGMENT THAT DOES NOT CONFORM TO CIVIL RULE 23(c)(3) 20

Conclusion 22

Appendix

Appendix A: Sixth Circuit Opinion and Judgment, May 15, 2008 ..... 1a

Appendix B: District Court Judgment, February 10, 2006 ..... 37a

Appendix C: Sixth Circuit Order Denying Rehearing, October 20, 2008 ..... 39a

Appendix D: Statutory Provisions Involved
Section 1 of the Sherman Act, 15 U.S.C. §1 41a
Section 4(a) of the Clayton Act, 15 U.S.C. §15(a) 41a
Section 4B of the Clayton Act, 15 U.S.C. §15b 43a
Section 5 of the Clayton Act, 15 U.S.C. §16(i) 43a

Appendix E: Rules Provision Involved
Federal Rule of Civil Procedure 23 ..... 44a

Appendix F: Jury Instruction on Statutory Tolling 49a

TABLE OF AUTHORITIES

FEDERAL CASES

Allen v. Wal-Mart Stores, Inc.,
241 F.3d 1293 (10th Cir. 2001) 10

Avins v. White,
627 F.2d 637 (3rd Cir. 1980) 10

Cramer v. United States,
325 U.S. 1 (1945) 10

Dillard & Sons Const. Inc. v. Burnup & Sims,
51 F.3d 910 (10th Cir. 1995) 10

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 19, 20

Harwood v. Partredereit AF 15.5.81,
944 F.2d 1187 (4th Cir. 1991), *cert. denied*, 503
U.S. 907 (1992) 10

Herrington v. Edwards,
1999 U.S. App. LEXIS 1220 (6th Cir.), *cert.*
denied, 527 U.S. 1049 (1999) 10, 11

Kosters v. The Seven-Up Co.,
595 F.2d 347 (6th Cir. 1979) 11

McMurray v. Deere and Co.,
858 F.2d 1436 (10th Cir. 1988) 10

Morrissey v. Nat'l Mar. Union of Am.,
544 F.2d 19 (2d Cir. 1976) 10

Robinson v. Union Carbide Corp.,
544 F.2d 1258 (5th Cir. 1977) 19

Stromberg v. California,
283 U.S. 359 (1931) 10

Sunkist Growers, Inc. v. Winkler & Smith Citrus Prods. Co.,
370 U.S. 19 (1962) 10

Terminiello v. City of Chicago,
337 U.S. 1 (1949) 10

United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki,
358 U.S. 613 (1959) 10

United States v. Palazzolo,
71 F.3d 1233 (6th Cir. 1995) 15

United States v. Rayborn,
491 F.3d 513 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1327 (2008) 15

Webber v. Sobba,
322 F.3d 1032 (8th Cir. 2003) 10

West Knoxville Assocs. Ltd. P'ship v. Ticor Title Ins. Co.,
1997 U.S. App. LEXIS 23942 (6th Cir. 1997) . 11

Williams v. North Carolina,
317 U.S. 287 (1942) 10

Woods v. Sammisa Co.,
873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990) 10

Yates v. United States,
354 U.S. 298 (1957) 10, 14

FEDERAL STATUTES

15 U.S.C. §1 1

15 U.S.C. §15 2

15 U.S.C. §15b 2, 4

15 U.S.C. §16(i) 2, 4

28 U.S.C. §1254(1) 1

28 U.S.C. §2101(c) 1

SUPREME COURT RULE

Rule 13.3 1

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23 . . . . . 2, 9

Rule 23(b)(3) . . . . . *passim*

Rule 23(c) 18

Rule 23(c)(1) 20

Rule 23(c)(2) . . . . . *passim*

Rule 23(c)(3) 7, 12, 20, 21, 22

Rule 23(e) 3, 19, 21

TEXTS

ABA Section of Litigation, Business and Commercial Litigation in Federal Courts (2d ed. 2005) 18

ABA AT-Daily Digest (Jan. 14, 2009) 8

Federal Judicial Ctr., The Manual for Complex Litigation (4th ed. 2004) 18

PETITION FOR A WRIT OF CERTIORARI

Columbia Iron & Metal Co. ("CIMCO") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated May 15, 2008, is officially reported as In re: Scrap Metal Antitrust Litigation at 527 F.3d 517 and is reproduced at App. A, 1a.

The order of the U.S. Court of Appeals denying rehearing, dated November 19, 2008, is reproduced at App. C, 39a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on May 15, 2008. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the entry of the order on November 19, 2008 denying rehearing of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

The relevant statutory provisions involved are Section 1 of the Sherman Act, 15 U.S.C. §1; Section

4(a) of the Clayton Act, 15 U.S.C. §15(a); Section 4B of the Clayton Act, 15 U.S.C. §15b; and Section 5 of the Clayton Act, 15 U.S.C. §16(i), which are reproduced at App. D, 41a- 43a. The relevant rule involved is Federal Rule of Civil Procedure 23, the pertinent portions of which are reproduced at App. E, 44a – 48a.

STATEMENT OF THE CASE

This case arose from a federal grand jury investigation of the scrap metal industry in Northeast Ohio. Several individuals and companies were charged at different times over a period of years with entering into agreements to rig bids for purchases of scrap or to allocate certain scrap generators in violation of Section 1 of the Sherman Act (15 U.S.C. §1). Petitioner was never charged.

After the first criminal charge was publicly announced in early 2000, several scrap generators filed class actions seeking treble damages under Section 4 of the Clayton Act (15 U.S.C. §15). Those cases were consolidated into this class action. On August 15, 2002, petitioner Columbia Iron & Metal Co. ("CIMCO") was added as a new defendant.

A. Class Certification and Notice.

Plaintiffs moved to certify a Civil Rule 23(b)(3) litigation class, and that motion was granted in March 2004. The trial court did not direct that any notice be provided to the class under Civil Rule 23(c), and none was sent at that time.

In May 2004, the trial court preliminarily approved settlements with some other defendants, approved full

and abbreviated forms of settlement notices proposed by class counsel, and directed dissemination of those settlement notices to the absent class members. The notices complied with Civil Rule 23(e) for settlement purposes. Class members were advised of the settlement amounts and claim procedures. They were also informed that "[w]hether or not the settlements ... are approved, the litigation will continue against the non-settling defendants;" that a class member must opt out in order to "pursue any claims against any defendants;" and that, if a class member should opt out, "You will be excluded from the Class Plaintiffs' prosecution of the claims against all defendants ... [and] you may present any claim you may have against ... any other defendant by filing your own lawsuit." However, for class members who did not opt out, there was nothing in either form of notice that "clearly and concisely state[d] in plain, easily understood language ... the binding effect of a class judgment on members under Rule 23(c)(3)" as required by Civil Rule 23(c)(2)(B).

Prior to trial, CIMCO and the other non-settling defendants objected to proceeding with class claims in the absence of the required (c)(2)(B) notice. The trial court denied that motion. At trial, a directed verdict was entered against all class members who sold non-ferrous scrap, representing almost one-half of the sales by the class.

B. Jury Instructions on Limitations Periods.

The jury was instructed on the remaining claims for sales of ferrous scrap. A key issue at trial was the time period during which scrap sales by class members were eligible for damages. Since the complaint was

filed against CIMCO on August 15, 2002, the standard limitations period of four years (15 U.S.C. §15b) exposed CIMCO to damages incurred by class members in transactions from August 15, 1998 to the end of the alleged conspiracy when the first government case was filed in March 2000, a period of 19 months. CIMCO requested an instruction to that effect, but the district court did not permit the jury to apply the basic statute of limitations and, instead, extended the minimum period for damages by an additional 29 months, i.e. beginning in March 1996 rather than August 1998. The court imposed that expansion of CIMCO's exposure with an instruction to the jury, which it described on the record "as a matter of law" (App. F at 49a, emphasis in original):

> In this case, the law imposes a four year limit on the plaintiffs' claim, which limit dates backward from March of 2000. Thus, unless the statute of limitations is tolled or extended for the reasons described in the Court's next instruction [on fraudulent concealment], the plaintiff may only prevail ... in the alleged conspiracy on or after March of 1996, and may only recover damages arising from conduct occurring after that date.

The court based that instruction on the antitrust tolling statute, Section 5 of the Clayton Act (15 U.S.C. §16(i), set forth in App. D at 43a). The court relied on that statute to extend the damages period back four years from March 2000, and not from August 15, 2002 when CIMCO was sued, because the court found that (1) when a government criminal antitrust case had been filed against an alleged co-conspirator in March 2000, (2) that proceeding had suspended the running

of the limitations clock, so that (3) the applicable damages period commenced in March 1996, four years prior to the commencement of the earlier government case.

That statutory tolling instruction was clearly erroneous because Section 5, by its express terms, does not apply to a subsequent private case like this one *unless* the defendant is sued during, or within one year after the conclusion of, the earlier government case. Otherwise, "any action to enforce such [private] cause of action shall be forever barred." The trial court simply overlooked the information on its docket that the March 2000 government case had ended with a plea and sentencing on June 21, 2000, almost 26 months before CIMCO was sued. Moreover, there was no other government proceeding filed during the one year period after the June 2000 conclusion of the March 2000 government case. Therefore, there was no factual basis for the statutory tolling instruction.

The jury was also instructed (a) that it should decide whether fraudulent concealment had been proved so as to extend the damages period back to "the date of the earliest injury" (alleged to be December 1992) and (b) that, if the fraudulent concealment proof failed to convince them, "you are limited to the post-March 1996 time period outlined in the previous [statutory tolling] instruction." Thus, the jury had two choices for the damages period: (1) a minimum of 48 months based solely on statutory tolling or (2) a longer period only if the jury found earlier fraudulent concealment. The jury was given no choice to limit damages to the untolled period of 19 months.

C. Damages Evidence and Verdict.

At trial, plaintiffs' evidence on damages consisted solely of the testimony of their expert. He opined that the cartel suppressed every price paid to ferrous scrap sellers from December 1992 (the beginning of the damages period based on the fraudulent concealment instruction) to the end of the conspiracy in March 2000 by 16.4%. He also testified that, by applying his rate to all ferrous sales for the entire period, class damages amounted to $20.9 million.

The trial court denied defendants' request for special interrogatories and a detailed verdict form. Using the trial court's more limited form, the jury returned a verdict against CIMCO in the aggregate amount of $11.5 million. The verdict form did not request or reveal the time period, the transactions or the class members the jury intended to cover by this aggregate award. Nor did the verdict form indicate the rate of damages used by the jury. The jury could have reached the same aggregate damages award by using either (a) the full 16.4% rate proposed by plaintiffs' expert for the period of 48 months covered by the erroneous statutory tolling instruction or (b) a lower, unknown rate for some longer period of time covered by the fraudulent concealment instruction.

The jury's verdict is fully consistent with a rejection of the fraudulent concealment evidence and reliance exclusively on the trial court's erroneous statutory tolling instruction. If that is what the jury did, CIMCO's liability exposure had been wrongfully increased by 29 months or more than 150 percent. With nothing to distinguish between the statutory tolling and fraudulent concealment concepts on the

verdict form, it was impossible to determine which of the two instructions the jury had followed.

The trial court trebled the verdict amount, credited the prior settlements and entered judgment against CIMCO for the net balance. The possible impact of the legal error on statutory tolling was profound. Even if the jury had accepted the methodology of plaintiffs' expert with no discount, applying those calculations to the proper untolled limitations period would have generated a verdict of $3.031 million. When trebled, that amount would have been less than the prior settlement payments obtained by plaintiffs and, consequently, would have resulted in a judgment for CIMCO.

D. Judgment Entry.

Civil Rule 23(c)(3) required the judgment entry to "specify or describe those to whom the Rule 23(c)(2) notice was directed ... and whom the court finds to be class members." That was impossible for two reasons. First, there had been no Rule 23(c)(2) notice. Second, without a definitive determination of the time period reflected in the verdict, and with no way to identify which of tens of thousands of generator transactions over more than seven years the jury had included in its own calculations, there was also no way to know who ultimately was in the class for whom an aggregate verdict had been returned. The judgment entry (set forth at App. B, 37a), therefore, made no pretense of compliance with Rule 23(c)(3).

E. Appeal.

CIMCO appealed to the U.S. Court of Appeals for the Sixth Circuit. That court held that it was unnecessary to consider the error in the first instruction on statutory tolling of the statute of limitations because "the jury could have reached the verdict based on the fraudulent concealment theory" in the alternative instruction. (App. A at 32a.) The Sixth Circuit also held that the three general statements in the class notice of the partial settlements - - concerning continuation of the litigation and opt out rights - - were sufficient to provide notice of the binding effect of the subsequent directed verdict against a portion of the class and a reduced judgment for another portion. The opinion cited a 1950 case but did not address the specific language of Rule 23(c)(2)(B). (App. A at 30a.) The Sixth Circuit declined a petition for rehearing on the former issue. (App. C at 39a.)

CIMCO petitions this Court for review of the Sixth Circuit's decision on those two holdings.

REASONS FOR GRANTING THE PETITION

This case presents important and common issues arising in treble damages antitrust class actions. These cases are one of the fastest growing categories of litigation in federal courts with filings in 2008 reported to have increased by 27 percent. (ABA AT-Daily Digest, Jan. 14, 2009.)

Most cases of this type follow government proceedings and are brought on behalf of large groups of customers or suppliers who may have been impacted by alleged cartel activity. Classes of this type, which

are seeking damages, are customarily certified, if at all, under Civil Rule 23(b)(3) because of common questions of law or fact. The effect of the prior government cases on the limitations periods for the subsequent private actions, and the proper judicial management of the class action procedure, are critical to the fair resolution of these cases by federal district courts. The prospect for trial court error in complex litigation like this, and the temptation for courts of appeals to accommodate error at the expense of precedent and applicable procedural rules, can easily corrupt a process intended to provide convenience and efficiency to litigants without compromising their due process rights.

This case illustrates antitrust class action problems in two fundamental respects. The first presents jury instructions on different premises for tolling the antitrust statute of limitations. When those instructions lead the jury to different relevant time periods, but one is legally incorrect, it becomes critical on review of the verdict to know whether the jury relied on the incorrect instruction or a correct instruction to set the time parameters for both evidence of a violation and calculation of damages. The second issue, which is inherent in every (b)(3) class action, is the seriousness of the command in Rule 23 that the trial court "must" provide certain information in a notice to the absent members of the class. When a district judge omits any of the specified categories and class members are left to infer the information or never to learn of it, the court has not meaningfully satisfied the Rule's directive that each item listed in Rule 23(c)(2)(B) "must [be] clearly and concisely state[d] in plain, easily understood language." Trial courts and litigants need to confront

these basic elements of ordinary due process in a diligent and objective manner.

This Court has held on multiple occasions that a criminal conviction[1] or civil judgment[2] must be reversed when it cannot be determined whether the jury's verdict was based on an erroneous instruction or an alternative correct instruction. The Court has applied that rule where the correct and incorrect instructions involved different limitations periods,[3] and it has reversed and remanded an antitrust treble damages verdict on that ground.[4] Numerous circuit courts[5] (including the Sixth Circuit until this

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[1] *Stromberg v. California*, 283 U.S. 359, 367-68 (1931)); *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945); *Terminiello v. City of Chicago*, 337 U.S. 1, 5-6 (1949); *Yates v. United States*, 354 U.S. 298, 312 (1957).

[2] *United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959); *Sunkist Growers, Inc. v. Winkler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962).

[3] *Yates*, *supra* n.1.

[4] *Sunkist*, *supra* n.2.

[5] *See, e.g., Morrissey v. Nat'l Mar. Union of Am.*, 544 F.2d 19, 26-27 (2d Cir. 1976); *Avins v. White*, 627 F.2d 637, 646 (3rd Cir. 1980); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-93 (4th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *Woods v. Sammisa Co.*, 873 F.2d 842, 853-54 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990); *Webber v. Sobba*, 322 F.3d 1032, 1038 (8th Cir. 2003); *McMurray v. Deere and Co.*, 858 F.2d 1436, 1444 (10th Cir. 1988); *Dillard & Sons Const. Inc. v. Burnup & Sims*, 51 F.3d 910, 916 (10th Cir. 1995); *Allen v. Wal-Mart Stores, Inc.*, 241 F.3d 1293, 1298-99 (10th Cir. 2001).

case[6]) have reversed judgments in civil and admiralty cases and remanded for a new trial unless it is virtually certain that an incorrect instruction could not have led to the jury verdict.

In this case, the Sixth Circuit adopted a new standard, *viz.* that the jury verdict must be affirmed so long as the jury "could have" relied on a correct instruction instead of the erroneous one. This standard not only conflicts with the principle set forth in this Court's precedents and the holdings of other circuit courts, but it undermines litigants' assurance of due process by allowing juries to rely upon incorrect instructions on the applicable law.

This Court has also mandated the best notice practicable for a certified Rule 23(b)(3) class. Rule 23(c)(2)(B) was amended to eliminate any excuse for a confusing or inadequate implementation of that obligation. The Rule explicitly states that it is the duty of the trial court to "direct to class members the best notice" and then is unequivocal in its requirement that the notice has to provide certain specified information in terms understandable to laymen, not just by implication to lawyers: "the notice must clearly and concisely state in plain, easily understood language" the express information set forth in seven categories. Those seven categories were separated as bullet points (now listed as subparagraphs i-vii) by the 2003 amendments to the Civil Rules (before class

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[6] *Kosters v. The Seven-Up Co.*, 595 F.2d 347, 355 (6th Cir. 1979); *West Knoxville Assocs. Ltd. P'ship v. Ticor Title Ins. Co.*, 1997 U.S. App. LEXIS 23942 at *28-29 (6th Cir. 1997); *cf. Herrington v. Edwards*, 1999 U.S. App. LEXIS 1220 at *19-20 (6th Cir.), *cert. denied*, 527 U.S. 1049 (1999) (criminal).

certification in this case) to make it obvious that each is essential. The last category is the most important to assure due process: according to the Rule, a class member "must" be told "the binding effect of a class judgment."

This Court has had no occasion since the promulgation of Rule 23(c)(2)(B) to encounter a lower court that has simply ignored that mandated element of adequate notice and deliberately proceeded to trial, notwithstanding having been alerted to its omission. Left uncorrected, this sort of noncompliance can be repeated, thereby undermining the series of progressively more demanding amendments to Rule 23 designed to assure due process

Civil Rule 23(c)(3) was also amended to reinforce the requirement of a specific notice and to link that notice to the ultimate judgment: "whether or not favorable to the class, the judgment in a class action must ... for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members." This Court has never confronted a (b)(3) class action judgment where that obligation was completely circumvented, as it was in this case.

This Court should grant certiorari (a) to address the application of its prior decisions to civil cases, and the conflict between the circuits, where there is verdict ambiguity between correct and erroneous jury instructions, as well as (b) to require trial courts to adhere to this Court's class action rule.

I. THE SIXTH CIRCUIT'S NEW STANDARD FOR AFFIRMING AN AMBIGUOUS JURY VERDICT DEPARTS FROM ITS OWN PRIOR STANDARD, CONFLICTS WITH THE STANDARD ADOPTED IN OTHER CIRCUITS AND CONTRADICTS THE DECISIONS OF THIS COURT.

While speculating that the jury "could have" relied on a fraudulent concealment instruction to reach its verdict, the Sixth Circuit was unable to deny that the jury also "could have" relied exclusively on the erroneous statutory tolling instruction to establish the relevant time period for both a Sherman Act violation and class damages.

The former assumption was based on a pure guess that the jury (a) may have considered evidence of activities eight or nine years prior to the lawsuit for violation purposes and (b) may have arbitrarily reduced the rate of damages proffered by plaintiffs' expert and substituted a lower rate of damages for transactions from December 1992 to March 2000 (the longer period if the fraudulent concealment instruction was followed).

Nonetheless, the jury's verdict was equally consistent - - indeed, more consistent - - with plaintiffs' argument of more recent wrongful acts in 1996 and application of the expert's full rate of damages just to transactions from March 1996 to March 2000 (the erroneous statutory tolling period). That possibility would mean that the jury had rejected fraudulent concealment as a matter of fact and had followed only the erroneous statutory tolling instruction. There is

nothing in the record to resolve that inherent uncertainty.

A. The Sixth Circuit's New Standard, that a Verdict Can Stand Where the Jury Was Instructed on Alternate Theories and May Have Followed Either a Correct or an Erroneous Instruction, Will Permit Juries to Rely upon Clear Errors of Law.

In *Yates v. United States*, 354 U.S. 298, 312 (1957), this Court reaffirmed the requirement of reversal, which it had established in a series of state and federal criminal cases (n. 1, *supra*), where it cannot clearly be determined whether the jury verdict was based on a correct or an incorrect instruction of the law:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

The Sixth Circuit in this case effectively reversed the impact of this rule by holding that the mere possibility that an acceptable instruction "could have" led to a verdict is sufficient to affirm. In so holding, the Sixth Circuit not only deviated from the proper rule enunciated by this Court and applied by other circuit courts in civil cases, it also set aside its own prior jurisprudence on this issue.

The distinction between harmless and reversible error in the face of dueling instructions always had turned on whether the jury's verdict "necessarily

demonstrates" that a "valid ground," and not a legally incorrect one, was the basis for the jury's decision. *See* discussion in *United States v. Palazzolo*, 71 F.3d 1233, 1235-37 (6th Cir. 1995). The Sixth Circuit had acknowledged in its prior decisions that a "view of probabilities concerning the jury's reasoning" should not sustain a verdict; there must be "a conclusive showing from the record that the jury 'necessarily' based its verdict on" a proper instruction of the law. *Id.*; *cf. United States v. Rayborn*, 491 F.3d 513 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1327 (2008) (jury verdict affirmed where the jury "must have" followed a proper instruction). If the Sixth Circuit had adhered to its prior view, the virtual certainty test it had been following would have required a reversal in this case (*Palazzolo*, 71 F.3d. at 1238):

> In the present case, the court gave an instruction that was legally incorrect. The jury had no way of determining that the instruction misstated the law .... [T]he possibility of error consisted of the jury following an erroneous instruction of the law .... Indeed, we must assume that the verdict lends itself at least to the possibility that the jury found the defendants guilty ... under an [erroneous] instruction....

Instead of adhering to that principle, the Sixth Circuit has now embraced the sufficiency of a mere possibility that the jury ignored the erroneous instruction.

Other circuits have faithfully followed this Court's rule in civil cases (n. 3, *supra*). This case marks a dramatic departure from the "must have," "necessarily demonstrates," "conclusive showing" and "absolute

certainty" criteria previously required to sustain an ambiguous general verdict by adopting the very different standard that a verdict will be affirmed merely because the jury "could have" ignored an incorrect instruction and, instead, applied another. The Sixth Circuit has substituted a possibility test for a certainty test, thereby expanding the class of cases that will be immune from reversal and a new trial, notwithstanding a jury's acceptance of a clear error of law.

The concept that a court can (1) provide a jury multiple ways to arrive at a verdict, (2) give jurors correct law on just one of those ways, (3) not be able to determine whether they followed the correct or the incorrect law and (4) accept the verdict because it is merely possible that the jury itself "could have" ignored every erroneous instruction, constitutes a license for trial courts to be casual - - even reckless - - in their instructions so long as at least one alternative is accurate. Verdicts that are in fact the consequence of a jury accepting a clear error of law will routinely be exempt from reversal.

That approach, if tolerated by this Court, will motivate parties to seek erroneous and prejudicial alternative instructions, then argue them to the jury, with the comfort that there is much to gain and nothing to lose. Successful overreaching can generate an enormous benefit without making a verdict induced by procured error vulnerable on appeal. That is what happened in this case with plaintiffs successfully arguing for, in fact inducing, the erroneous statutory tolling instruction.

A change this antithetical to prevailing law, the traditional review of jury verdicts and fundamental requirements of due process should not be tolerated. Once the gate is opened for this kind of gamesmanship at the trial level, there is no systemic discipline because there is no risk of a negative consequence for leading the trial court astray, and fatal legal errors are likely to recur with some frequency.

B. The Sixth Circuit's Standard Will Allow Reviewing Courts to Affirm Verdicts without Examining the Errors upon which the Verdicts May Be Based.

The disposition below demonstrates the consequence of the Sixth Circuit's new approach. This Court's rule, and that of other circuits, has mandated an examination of alternative instructions and reversal of an ambiguous verdict where any of the relevant instructions was legally incorrect. Under the Sixth Circuit approach, a reviewing court can, and presumably will, eschew a concern for errors and, instead, pursue a search for any alternate correct instruction on which the jury might have relied. Having found at least one route to a verdict that would have been lawful, the court of appeals would then not need to consider whether any of the other possible routes actually used by the jury would have caused the jury to base its decision on legal error.

That is precisely what happened in this case. The Sixth Circuit first concluded that the jury "could have" reached its verdict by applying the fraudulent concealment instruction. Then the court declined to address the statutory tolling instruction on the principle that it had become superfluous: "Because we

conclude that the jury could have reached the verdict based on the fraudulent concealment theory, we do not reach [CIMCO's] objection to the statutory tolling instruction." (App. A at 32a.)

That approach to judicial review has abandoned the rule announced by this Court, followed by the other circuits, and previously endorsed by the Sixth Circuit itself. Having found one unpoisoned piece of fruit in a basket, the Sixth Circuit eschews any concern whether the victim actually ate a different and fatal piece.

II. THE SIXTH CIRCUIT HAS ELIMINATED THE REQUIREMENT OF CIVIL RULE 23(c)(2)(B) FOR NOTICE TO A CERTIFIED RULE 23(b)(3) CLASS OF THE BINDING EFFECT OF A CLASS JUDGMENT.

For decades, Rule 23(c) has required an explicit notice to a Rule 23(b)(3) trial class of the binding effect of a judgment on the absent members of the class. "At least where a claim for legal relief in the form of monetary damages is at stake, each class member's interest in litigation is presumptively sufficient to constitute a property interest for purposes of the Due Process Clause." ABA Section of Litigation, Business and Commercial Litigation in Federal Courts (2d ed. 2005), §16:29 at 348. "[T]he notice requirements of Rule 23(c)(2) for 23(b)(3) class actions are mandatory and may not be waived at the discretion of the district court." *Id.*, §16:38 at 367.

The seven essential components for sufficient notice to a Rule 23(b)(3) class were separated as bullet points in the 2003 version of Rule 23(c) to make them even more obvious. The Manual for Complex Litigation,

Fourth (§1.311) makes the point unequivocally that none of them is optional. This Court explained in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (omission in original) that "The Advisory Committee described (c)(2) as 'not merely discretionary' and added that the 'mandatory notice pursuant to subdivision (c)(2) ...is designed to fulfill requirements of due process to which the class action procedure is of course subject.'"

The class notice is intended to protect both the absent class members and the defendant. The former are entitled to know that, if they entrust their claim to the counsel who has volunteered to represent them, they will be obliged to accept whatever result he may achieve. The defendant is entitled to protection from second-guessing by a disgruntled class member who may otherwise believe he can sit on the sideline and choose to opt in to take advantage of only a desirable outcome. Courts have described this problem as "sideline sitting." *See, e.g., Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1262 (5th Cir. 1977).

By its decision in this case, the Sixth Circuit now permits general language in a notice of partial settlements under Rule 23(e) - - concerning opt out rights and the fact that litigation will continue against non-settling defendants - - to replace a Rule 23(c)(2)(B) notice with no reference whatsoever to the binding effect on class members of any later judgment for or against the non-settling defendants. While someone legally trained may infer that this would be the ultimate consequence of ongoing litigation, a class notice is directed to laymen with little or no familiarity with legal procedure.

When a layman is told that "the litigation will continue," that he must opt out to "pursue any claims against any defendants," including the settling defendants, and that, if he opts out, he "will be excluded" from the class and may "present any claim ... by filing your own lawsuit," he does not necessarily understand that he will have no later opportunity to avoid or challenge a result with which he disagrees. That is why Rule 23(c)(2)(B) obligates the trial court to make that clear. The Sixth Circuit has seriously eroded that requirement by endorsing notice language that cannot be said to meet the requirement of Rule 23(c)(2)(B) for clear, concise, plain and easily understood language explaining that point.

Since settlements with fewer than all defendants are common in antitrust conspiracy cases, and plaintiffs' counsel are often inclined to seek approval of those settlements to facilitate interim distributions of the proceeds and payment of fees before a trial against the remaining defendants, this form of inadequate notice, if tolerated, can easily proliferate.

III. THE SIXTH CIRCUIT PERMITS A FINAL JUDGMENT THAT DOES NOT CONFORM TO CIVIL RULE 23(c)(3).

When the trial court consciously proceeded to a final judgment without satisfying the notice requirement, clarifying the verdict or amending the class certification order, the court deliberately ignored both the language of Rule 23(c)(1)(C) and Justice Douglas' observation in *Eisen, supra*, 417 U.S. at 184, that "[i]t is as plain as words can make it that the court which decides that a full class action can be

maintained can alter or amend its order 'before the decision on the merits.'"

Rule 23(c)(3) performs two important functions. First, it demands clarity in a class action judgment for purposes of identifying those to whom it applies and to facilitate enforcement. Second, it imposes self-discipline on the trial court by forcing a reconciliation between the formal disposition of the case and the process by which the case reached its conclusion. Thus, for a (b)(3) class, Rule 23(c)(3) requires a link to the specific form of notice mandated by Rule 23(c)(2)(B), and it also requires a link to the verdict to establish those persons covered by the jury's decision.

When it entered its judgment (set forth at App. B, 37a-38a), the court was incapable of complying with the explicit requirements of Rule 23(c)(3). Since no (c)(2) notice had ever been directed to anyone, the court was unable to satisfy the provision that "the judgment in a class action must...specify or describe those to whom the Rule 23(c)(2) notice was directed." The judgment did not even identify those receiving the Rule 23(e) settlement notice. Since there was no way to determine which generators of ferrous scrap had been included by the jury - - those selling from 1992 to 2000 or only those selling from 1996 to 2000, the court was unable to satisfy the provision that "the judgment in a class action must ... specify or describe those ... whom the court finds to be class members."

Having accommodated the trial court's notice deficiency, and having concluded that the inherent ambiguity in the transactions and class members the jury intended to include in its aggregate verdict was also acceptable, the Sixth Circuit chose to ignore the

derivative defects in the judgment entry without comment.

The form of judgment adopted by the trial court and its acceptance by the Sixth Circuit effectively nullified Rule 23(c)(3). This approach will eliminate the discipline imposed by the Rule to assure that the disposition of a class action accurately reflects satisfaction of the necessary procedural and due process prerequisites.

CONCLUSION

The petition should be granted and a writ of certiorari issued to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-4511

[Decided and Filed: May 15, 2008]

In re: SCRAP METAL ANTITRUST LITIGATION

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 02-00844—Kathleen McDonald O'Malley, District Judge.

Argued: October 30, 2007

Before: BATCHELDER, COLE, and SUTTON, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge. Defendant-Appellant Columbia Iron and Metal Company ("Columbia") appeals a jury verdict finding Columbia liable for antitrust violations and awarding the Plaintiffs-Appellees damages exceeding $20 million. The most critical question on appeal relates to the damages testimony of Plaintiffs-Appellees' expert, Dr. Jeffrey Leitzinger. Columbia asserts that Leitzinger's

damages calculations are unreliable, and that the district court therefore erred in admitting his testimony. Columbia also raises three additional arguments on appeal: (1) the damages award is not supported by sufficient evidence and represents an impermissible "fluid recovery"; (2) the district court improperly allowed the case to proceed as a class action; and (3) the district court improperly instructed the jury on the tolling of the statute of limitations. Finding no reversible error by the district court, we **AFFIRM** the verdict and damages award.

I. BACKGROUND

Plaintiffs-Appellees Lincoln Electric Company and Profile Grinding, Inc. filed suit in 2002 on behalf of themselves and a class of industrial scrap-generating companies in Northeastern Ohio (collectively, "Plaintiffs") against, inter alia, Defendant-Appellant Columbia; Columbia National Group (Columbia's parent company); Harry Rock & Associates; M. Weingold & Co., Inc.; DeMilta Iron and Metal; Bay Metal, Inc.; Bluestar Metal Recycling, Inc.; and Parkwood Iron and Metal, Inc. (collectively, "Defendants"). Plaintiffs generate scrap metal, both ferrous (iron-based) and nonferrous, as a byproduct of their manufacturing. Plaintiffs sell the unprocessed scrap metal to brokers and dealers, such as Defendants, who then haul, clean, sort, and process the scrap before selling it to end users, such as steel mills. The movement of unprocessed scrap from generators to dealers generally works as follows: The dealers submit bids to the generators for the purchase of unprocessed scrap during a specified time period at a set price. In setting their bid price, dealers consult various trade publications, which report the prevailing

prices that dealers can expect to charge users for the scrap after they have processed it. To ensure that they turn a profit, dealers set their bid price for the unprocessed scrap below the amount they will ultimately charge the users for the processed scrap. If the bid is accepted by the scrap generator, the generator and the dealer enter into a contract at the bid price for the bid period.

In this case, Plaintiffs allege that Defendants violated § 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to restrain and eliminate competition in the purchase of unprocessed industrial scrap metal in Northeastern Ohio. Specifically, Plaintiffs claim that Defendants engaged in a variety of unlawful acts including allocating scrap metal generators among dealers, agreeing not to compete with one another, submitting rigged bids, setting prices for the purchase of unprocessed scrap metal, and imposing financial penalties on co-conspirators for disobeying allocation agreements.

On May 30, 2003, Plaintiffs moved to certify a class consisting of all generators who sold scrap metal to Defendants and/or their co-conspirators between December 1992 and March 2000. The district court certified the class in March 2004.

Prior to trial, Plaintiffs settled with or dismissed all but three Defendants. In 2005, the remaining Defendants, including Columbia, filed a motion to preclude damages testimony from Plaintiffs' expert economist, Dr. Jeffrey Leitzinger. The district court denied the motion, finding that Defendants' arguments relating to Leitzinger's damages analysis went to the weight, not the admissibility, of his testimony.

Defendants then moved for summary judgment, which the district court also denied. Three days before trial, Columbia moved to decertify the class, claiming that it had just discovered that the class notice was inadequate. The district court denied Columbia's motion, and the three remaining Defendants, including Columbia, proceeded to trial.

At the conclusion of the trial, the court directed a verdict against Plaintiffs for all claims relating to non-ferrous scrap-metal sales on the ground that Plaintiffs failed to establish any proof of injury or damages relating to such transactions. As for the remaining claims, those relating to ferrous scrap-metal sales, the jury returned a verdict against Columbia only and awarded Plaintiffs $11.5 million in damages. The district court, pursuant to 15 U.S.C. § 15(a), tripled the jury's award to $34.5 million, subtracted the amount received from the settling Defendants, and thereupon entered a judgment against Columbia in the amount of $23,036,000.

Columbia moved for judgment as a matter of law and, alternatively, for a new trial or a reduction of the damages. The district court denied both motions, and Columbia timely appealed.

II. ANALYSIS

Columbia presents four issues on appeal. First, Columbia claims that the district court erred in denying its motion to exclude Leitzinger's testimony. Second, Columbia asserts that the evidence was insufficient to support the damages award and that the award represents an impermissible "fluid recovery." Third, Columbia argues that the district

court did not comply with Federal Rule of Civil Procedure 23 in certifying a class and allowing the case to proceed as a class action. Finally, Columbia challenges the district court's instructions to the jury on the tolling of the statute of limitations. We address each of these arguments in turn.

A. Admissibility of Leitzinger's Testimony

1. Leitzinger's Calculations

We begin by summarizing Leitzinger's testimony, which Plaintiffs offered to prove the amount of damages the class incurred as a result of Defendants' anticompetitive conduct. Leitzinger employed what is referred to interchangeably as the "during and after" or "before and after" method to determine the amount Defendants underpaid Plaintiffs for unprocessed scrap metal. Employing this method, the profits made by antitrust defendants *during* the alleged conspiracy are compared with the profits made by the defendants in the period *after* the alleged conspiracy. In simple terms, by analyzing this difference, an expert can determine the amount of profit during the conspiracy period had the antitrust violation not occurred. Presumably, the data would show that, but for the anticompetitive conduct, the defendants' profit margin would have been lower and the plaintiffs' profit margin would have been higher.

Here, Leitzinger calculated the difference, both during and after the alleged conspiracy, between (1) the generator-dealer transactions, i.e., the amount the dealers paid to the generators for unprocessed scrap metal, and (2) the dealer-user transactions, i.e., the amount for which the dealers sold processed scrap

metal to users. Leitzinger used actual transaction data from a sample of generators and dealers for the generator-dealer transactions. However, in order to control for factors other than the conspiracy that might have affected prices, Leitzinger used index prices for the dealer-user transactions, which were published on a weekly basis in American Metal Market ("AMM") and *Iron Age* magazine's Scrap Price Bulletin ("SPB"). These index prices represented the prevailing prices users paid dealers for processed scrap. Leitzinger testified that Defendants also used these published prices to determine the amount they would bid on the generators' unprocessed scrap. The "price spread"—the difference between (1) the price a dealer paid to a generator for unprocessed scrap, and (2) the comparative figure from a price index, representing the amount the dealer earned from selling the processed scrap to a user—was the dealer's profit. By comparing the price spread during the conspiracy period with the price spread after the conspiracy period, Leitzinger concluded that the results were consistent with anticompetitive conduct: Defendants' profits declined after the conspiracy, while the generators' profits rose.

Leitzinger used the SPB index to analyze only the ferrous scrap-metal market. He concluded that, on average, there had been a 16.4 percent undercharge on the purchase of unprocessed ferrous scrap metal during the conspiracy period. Put another way, Leitzinger concluded that Defendants would have paid Plaintiffs 16.4 percent more for unprocessed ferrous scrap metal in the absence of an antitrust conspiracy. Because Defendants' total purchases of ferrous scrap metal from the class members during the class period amounted to $127.6 million, Leitzinger calculated

damages at $20.9 million ($127.6 million times 16.4 percent).

As to the non-ferrous scrap-metal market, Leitzinger used the AMM index to make his calculations, rather than the SPB index, because market participants regularly used the AMM index to price non-ferrous scrap. Leitzinger was unable to identify any undercharge affecting dealers' purchase of non-ferrous scrap, which he attributed to his inability to assemble "enough data of the right quality to be able to really and truly see what had happened on the nonferrous side."

2. Scrap Price Bulletin

Columbia objects to Leitzinger's use of the SPB index to ascertain the pricing of dealer-user ferrous scrap-metal sales. Although evidence at trial showed that the SPB index was commonly used by dealers as a benchmark for pricing processed ferrous scrap, Columbia argues that this index is not a reliable source for damages calculations because on December 7, 1998 and October 4, 1999, *Iron Age* issued a correction to the SPB, stating that thirteen of the eighteen categories of processed ferrous scrap had been reported incorrectly for an unknown period of time. At his deposition, Leitzinger explained that this adjustment was merely a result of the magazine's "change in [its] method of reporting prices." Leitzinger said that *Iron Age* decided to switch from reporting prices "FOB dealer to FOB user," thereby adding additional costs like transportation and broker fees to

the reported prices.[1] To "account for the *Iron Age* reporting method change" and "to measure the value that generators received relative to a consistent processed scrap price," Leitzinger "backed out" the December 1998 and October 1999 "corrections" by subtracting them from the SPB index prices.

Following Leitzinger's deposition, Columbia submitted the affidavit of John Ambrosia, an *Iron Age* reporter, who explained that the magazine adjusted the SPB prices because, for some unexplained reason, they failed to reflect actual transaction prices for the Northeastern Ohio area. The corrections were therefore necessary to ensure that the SPB index accurately reported market prices. Ambrosia stated that the adjustments had nothing to do with a change in pricing measuring points, e.g., "FOB dealer to FOB user," as Leitzinger believed. Moreover, Ambrosia said that he did not know when the ferrous scrap prices had begun to depart from actual market prices.

Columbia asserts that because Leitzinger assumed that the increases in the SPB index simply reflected a change in the price measuring point, he mistakenly concluded that he could create a "consistent processed-ferrous-scrap-price data set" by "backing out" the amount of the SPB increases. Plaintiffs concede that Leitzinger's assumption that *Iron Age* simply changed reporting methods was incorrect and that the SPB

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[1] "FOB," meaning "free on board" is a delivery term which indicates what transportation costs and risks the dealer must assume. "FOB dealer" means that the dealer is responsible for getting the goods to a common carrier; "FOB user" means that the dealer is responsible for getting the goods to the user. 18 Richard A. Lord, Williston on Contracts § 52:11 (4th ed. 2007).

corrections were necessary to accurately report market prices for processed ferrous scrap. Columbia thus argues that Leitzinger's analysis is fatally flawed for two reasons: First, as the argument goes, Leitzinger did not have a reliable data set to work with prior to December 7, 1998, when the SPB index was brought back into alignment with actual market prices. Second, by "backing out" the corrections, Leitzinger made the SPB data with which he was working inaccurate.

Columbia compares Leitzinger's conclusion that there was a 16.4 percent undercharge during the conspiracy with his inability to identify any measurable damages in connection with non-ferrous scrap sales. Columbia argues that this inconsistency makes no sense because the same scrap dealers were purchasing both ferrous and non-ferrous scrap during the conspiracy, usually from the same generators. It is therefore reasonable to expect that if there was an undercharge for the sale of ferrous scrap, there similarly would have been an undercharge for the sale of non-ferrous scrap. Columbia argues that there is an obvious culprit behind this discrepancy: Whereas Leitzinger used the inaccurate SPB price index in calculating the ferrous-scrap undercharge (and then made that data even more inaccurate by subtracting out the 1998 and 1999 adjustments), he used the AMM price index in analyzing the non-ferrous scrap market. Columbia points out that, unlike the SPB index, the AMM required no "corrections" to ensure that it accurately reflected actual market prices. Further, at trial, Columbia's expert testified that when he substituted the AMM data into Leitzinger's ferrous analysis, "most of the apparent damages disappeared." Plaintiffs counter Columbia's argument in several ways. First, Plaintiffs claim that Leitzinger's decision

to rely on the SPB index for ferrous transactions and on the AMM index for non-ferrous transactions was proper because that is exactly what the relevant industry actors did. Testimony at trial established that industry participants used the SPB to price ferrous scrap and the AMM to price non-ferrous scrap. Second, and relatedly, Plaintiffs argue that regardless of whether the SPB numbers were accurate, because the industry participants referred to those numbers for their pricing decisions, it was entirely appropriate for Leitzinger to rely on them to calculate Plaintiffs' damages in connection with their ferrous scrap sales. Third, Plaintiffs argue that Leitzinger made the right call when he "backed out" the SPB adjustments because the dealers themselves did the same thing. In other words, the dealers did not increase their bid price to the generators based on the new SPB numbers, but instead held firm to the old numbers. Thus, according to Plaintiffs, even though Leitzinger got the reason for the SPB adjustments wrong, all that matters is that he treated the adjustments just as the industry participants did—by backing them out of the SPB prices. Stated otherwise, Plaintiffs claim that Leitzinger relied on the SPB index to account for market changes, and when the SPB index adjusted, he, *just like Defendants*, backed out the adjustments. Finally, Plaintiffs assert that Columbia's argument founders on the testimony of its own expert, who stated at trial that as long as the SPB index moved "roughly parallel" to actual prices of processed ferrous scrap, inaccuracies in the index were not material. Indeed, Plaintiffs displayed a graph at trial showing "roughly parallel" lines representing actual sales prices for processed ferrous scrap and the SPB indices.

3. The District Court's Ruling

The district court denied Columbia's motion to preclude Leitzinger's testimony. The court explained that it had

> spent a substantial amount of time and effort reviewing the parties' voluminous filings relative to the admissibility—or inadmissibility—of Dr. Leitzinger's testimony pursuant to the applicable standards set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Despite [Columbia's] many well-supported attacks on the underlying data employed and assumptions made by Dr. Leitzinger in reaching his assumed damage calculation, the Court finds that those attacks are best reserved for cross-examination and do not, in this case, rise to the level warranting exclusion under *Daubert*.

(JA 799-800.) The court went on to state that there was "substantial room for debate" about Leitzinger's data set and "substantial bases upon which to criticize" certain of his assumptions. Nonetheless, the court concluded that

> Dr. Leitzinger has provided reasoned explanations for the assumptions that he made and has, at least at [this] stage, presented viable arguments to support his data set choices. Whether those explanations will withstand rigorous cross-examination, or challenges based on alternative assumptions or data choices, is not the issue now before the Court. The Court concludes that Dr. Leitzinger's

> opinions satisfy the *Daubert* standard and that [Columbia's] criticisms of those opinions simply are appropriate fodder for cross-examination.

(*Id.*)

In response to the two post-trial motions filed by Columbia, a motion for judgment as a matter of law and a motion for a new trial, the district court made

> one final observation regarding the nature and strength of Leitzinger's testimony. As noted, the Court spent a substantial period of time analyzing, and re-analyzing, the Defendants' *Daubert* motions seeking to exclude Leitzinger's testimony in its entirety. The Court felt that Defendants' challenges were substantial and written attacks on his testimony articulately stated. It was only after several passes through the motion papers that the Court was able to understand that those challenges, though pointed, went to the weight and not the admissibility of Leitzinger's opinions- i.e., did not justify the wholesale exclusion of testimony Defendants sought.
>
> The Court finds it notable that, after hearing Leitzinger's testimony in open court, hearing his responses to counsel's pointed attacks on cross-examination, and hearing what ultimately proved to be only limited critiques of Leitzinger's analysis by [Defendants' expert], the Court was more convinced than it had been when it made its initial *Daubert* ruling that its ruling was correct. . . . Ultimately, the debate

> over Leitzinger's testimony was left where it should have remained-with the jury.

In re Scrap Metal Antitrust Litigation, No. 1:02CV0844, 2006 WL 2850453, at *18 (N.D. Ohio Sept. 30, 2006).

4. Standard of Review

We review for abuse of discretion the district court's determination to admit or exclude expert testimony, "recognizing, of course, that such review calls for deference to the district court's decision." *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 781 (6th Cir. 2002) (citing *Clay v. Ford Motor Co.*, 215 F.3d 663, 666 (6th Cir. 2000)). Such deference applies to the way in which the court assesses admissibility as well as the court's ultimate decision of admissibility. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152-53 (1999). Thus, we will not substitute our own judgment for that of the district court and will reverse an evidentiary decision "only where we are left with a definite and firm conviction that [the district court] committed a clear error of judgment." *Conwood*, 290 F.3d at 781 (citing *Singleton v. United States*, 277 F.3d 864, 870 (6th Cir. 2002); *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir.1999)).

5. Discussion

The starting point in our analysis is Federal Rule of Evidence 702, which governs the use of expert testimony. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to

> understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule, as amended in 2000, reflects the Supreme Court's decisions in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Kumho*. Fed. R. Evid. 702 advisory committee's notes, 2000 amend. ("In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science.").

Parsing the language of the Rule, it is evident that a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Second, the testimony must be relevant, meaning that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Third, the testimony must be reliable. *Id.* Rule 702 guides the trial court by providing general standards to assess reliability: whether the testimony is based upon "sufficient facts or data," whether the testimony is the "product of reliable principles and methods," and whether the expert "has applied the principles and methods

reliably to the facts of the case." *Id.* In addition, *Daubert* provided a non-exclusive checklist for trial courts to consult in evaluating the reliability of expert testimony. These factors include: "testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique's operation, and general acceptance in the relevant scientific community." *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001) (citing *Daubert*, 509 U.S. at 593-94). The test of reliability is "flexible," and the *Daubert* factors do not constitute a "definitive checklist or test," but may be tailored to the facts of a particular case. *Kumho*, 526 U.S. at 150 (citing *Daubert*, 509 U.S. at 593). Indeed, we have recognized that the *Daubert* factors "are not dispositive in every case" and should be applied only "where they are reasonable measures of the reliability of expert testimony." *Grossv. Comm'r*, 272 F.3d 333, 339 (6th Cir. 2001).

On appeal, Columbia does not argue that Leitzinger was unqualified as an expert or that his testimony was irrelevant. Nor does Columbia challenge generally the reliability of the "during and after" method to determine damages; indeed, this method is broadly accepted for proving antitrust damages. *See Conwood*, 290 F.3d at 793 n.8 (explaining that "[t]he before and after theory compares the plaintiff's profit record prior to the violation with that subsequent to it" and finding such method accepted in antitrust cases) (internal quotation and citation omitted). Columbia's argument, rather, is limited to challenging the reliability of Leitzinger's testimony specifically because of his use of the inaccurate SPB price index and his alterations to the SPB's prices. Columbia contends that Leitzinger used erroneous data and necessarily produced an erroneous conclusion; in sum, "garbage in, garbage

out." Columbia argues that the district court should have, therefore, excluded Leitzinger's proposed testimony as insufficiently reliable under Rule 702.

Columbia's argument is unpersuasive because it fundamentally confuses the *credibility and accuracy* of Leitzinger's opinion with its *reliability*. Contrary to Columbia's assertions, a determination that proffered expert testimony is reliable does not indicate, in any way, the correctness or truthfulness of such an opinion. Indeed, although "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert," *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), a court must be sure not "to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other." Fed. R. Evid. 702 advisory committee's note, 2000 amend. Instead, the requirement that an expert's testimony be reliable means that it must be "supported by appropriate validation—i.e., 'good grounds,' based on what is known." *Daubert*, 509 U.S. at 590. The task for the district court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation. *See* Fed. R. Evid. 702 (explaining that expert testimony must be based on "sufficient facts or data" and the "product of reliable principles and methods"); *Conwood*, 290 F.3d at 792 (stating that the district court must determine whether proffered expert testimony "rests on a reliable foundation") (internal quotation and citation omitted).

An analogous case is illustrative. In *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1343-44 (11th Cir. 2003), the appellant challenged the admission of the appellee's expert testimony relating to computational fluid dynamics ("CFD"). The appellant focused on the specific application of the CFD method, not on the reliability of the CFD method in general. Specifically, the appellant argued that the expert used incorrect data or was missing data to run the CFD study and used the wrong equations to run the analysis. *Id.* at 1344. If the data used was incorrect, the appellant argued, the conclusions necessarily were flawed as well and should be excluded from the jury. *Id.* at 1344-45. The Eleventh Circuit, however, held that such an attack goes to the weight of the evidence, rather than to its admissibility:

> [The appellant] does not argue that it is improper to conduct a CFD study using the sorts of aerodynamic data that [the appellee] employed, but rather that the specific numbers that [the appellee] used were wrong. Thus, the alleged flaws in [the appellee's] analysis are of a character that impugn the *accuracy* of his results, not the general scientific *validity* of his methods.
>
> The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination.

Id. at 1345 (emphasis added).

That is not to say that a significant error in application will never go to the admissibility, as opposed to the weight, of the evidence. Indeed, the

2000 amendments to Rule 702 explain that an expert witness must "appl[y] the principles and methods reliably to the facts of the case." Fed. R. Evid. 702(3); *see also* Fed. R. Evid. 702 advisory committee's note, 2000 amend. ("[A]*ny* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible.") (internal quotation marks omitted). But "rejection of expert testimony is the exception, rather than the rule," *id.*, and we will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record.

For example, in *Jahn v. Equine Services*, 233 F.3d 382 (6th Cir. 2000), this Court reversed a district judge's decision holding inadmissible proposed expert testimony, and remanded for a hearing. The Court explained that although the opinions of the proffered testimony "may very well be 'shaky,'" because the opinions were based upon facts in the record, and were not "assumptions" or "guesses," challenges merely went to the accuracy of the conclusions, not to the reliability of the testimony. *Id.* at 390-93. *See also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) ("An expert's opinion, where based on assumed facts, must find some support for those assumptions in the record. However, mere 'weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility.' (quoting *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir.1993)) (internal citations omitted)); *Cooke*, 991 F.2d at 342 ("Where an expert's testimony amounts to 'mere guess or speculation,' the court should exclude his testimony, but where the opinion has a reasonable factual basis, it should not be excluded. Rather, it is up to opposing counsel to inquire into the expert's factual basis.")

Here, Columbia takes issue with the factual basis of Leitzinger's testimony, specifically his use of the SPB data, his understanding of what the December 1998 and October 1999 adjustments meant, and his reasons for backing out those adjustments. But Columbia does not argue that Leitzinger's opinion is entirely unsupported, that he merely pulled the numbers comprising his calculations out of thin air. Insofar as Columbia claims that Leitzinger should not have used the SPB index at all, that argument fails in light of the uncontroverted testimony at trial establishing that the industry participants used the SPB index to fix prices for ferrous scrap.

Next, we agree with the district court that Leitzinger's "backing out" of the SPB adjustments did not render his expert opinion fatally unreliable and subject to exclusion. Leitzinger offered a foundation for how and why he analyzed the data as he did. He testified at trial that subtracting the SPB corrections mirrored exactly what dealers had done in the marketplace at the time the corrections were announced. In support, he referred to three letters that dealers sent in December 1998 to three generators with unexpired contracts that contained price formulas tied to the SPB. The letters requested a modification to the contracts in light of the substantial increase in the SPB index. As Leitzinger explained at trial:

> [T]he major dealers . . . promptly sent letters to customers [i.e., generators] saying here's the change in index. We want to adjust the differential to back it out. Just because the magazine changed the index doesn't mean we are now going to pay you more money. If our contract used to be index less 20, and they just

> raised the index by $20, . . . we want it to be index less 40. So they immediately sent letters out saying we want to, in effect, unwind the increase by Scrap Price Bulletin.

(JA 1195.)

In addition, Leitzinger referenced a graph at trial that showed "roughly parallel" lines, one representing actual sale prices for processed ferrous scrap and the other representing the corresponding SPB index prices. Even Defendants' expert agreed that for the purposes of Leitzinger's analysis, it did not matter whether the SPB index accurately reflected price for processed scrap and that all that mattered was that the SPB index moved "roughly parallel" to actual prices for processed scrap. Thus, the graph provided evidence that indeed the market followed the SPB index even after December 1998 and October 1999 corrections were made and that any inaccuracies in the SPB were irrelevant so long as the index moved up and down over time parallel to actual market prices.

In sum, the jury was free to give Leitzinger's opinion little or no weight, and to credit instead Defendants' attacks on his decision to back out the adjustments. We cannot say that the district court abused its discretion in admitting Leitzinger's testimony when the record shows that he performed his analysis according to a reliable method (the "during and after" method) and reliably applied that method to the facts of this case. Moreover, Leitzinger's calculations were tested on cross-examination and subjected to further scrutiny and criticism by Defendants' own expert. *Daubert*, 509 U.S. at 593 (explaining that in analyzing the reliability of an

expert's testimony, the "key question" is "whether it can be (and has been) tested"). The question of whether Leitzinger's opinion is accurate in light of his use of the SPB data goes to the weight of the evidence, not to its admissibility, and the district court appropriately passed the torch to the jury to make this determination. *See id.* at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *see also Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 415 n.3 (3d Cir. 2002) ("While the Federal Rules of Evidence call upon the courts to serve as gatekeepers who independently evaluate the admissibility of expert opinion testimony, they rely upon the discretion of the trial courts—not the discretion of the courts of appeals. Because the record contains *some* factual basis—albeit shaky—for [the expert's] testimony, the District Court did not abuse its discretion in performing this gatekeeping function." (internal citations omitted)).

Finally we note that the district court did not abuse its discretion by failing to hold a *Daubert* hearing, because the record on the expert testimony was extensive, and the *Daubert* issue was fully briefed by the parties. *Clay v. Ford Motor Co.*, 215 F.3d 663, 667 (6th Cir. 2000) (stating that a district court is not required to conduct a *Daubert* evidentiary hearing to qualify an expert witness). Columbia claims that the district court's opinion in response to Columbia's motion to preclude Leitzinger's testimony was cursory. We conclude that the court accurately considered the key issues, found the testimony to be sufficiently reliable by stating that Leitzinger "provided reasoned explanations" and "presented viable arguments" for his

calculations, and concluded that Columbia's attacks were most appropriate for cross-examination. We, therefore, cannot say that the district court abused its discretion.

B. Damages Award

Columbia argues that even crediting Leitzinger's testimony, there is insufficient evidence to support the damages verdict and, in any event, the verdict is an impermissible "fluid recovery."

Columbia raised this issue in its Rule 50(a) and (b) motions for judgment as a matter of law. We review a district court's refusal to grant a party's motion for judgment as a matter of law de novo. *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 788 (6th Cir. 2005). We have explained that the standard of review is identical to that used by the district court:

> The evidence should not be weighed, and the credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury; instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant.

Tisdale v. Fed. Exp. Corp., 415 F.3d 516, 531 (6th Cir. 2005) (quoting *Williams v. Nashville Network*, 132 F.3d 1123, 1130-31 (6th Cir. 1997)).

1. Sufficiency of the Evidence

"An antitrust plaintiff seeking treble damages under section 4 of the Clayton Act must prove an antitrust violation, fact of damage or injury, and measurable damages." *Danny Kresky Enter. Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983).

Columbia argues that Plaintiffs failed to provide the jury with sufficient evidence to support the jury's finding of individual and market-wide damages. Columbia recognizes that Leitzinger opined that every class member who sold ferrous scrap incurred a 16.4 percent undercharge for every sale during the class period, resulting in aggregate damages of $20.9 million. But because the jury reached a verdict of $11.5 million in damages, Columbia argues, the jury must have resorted to speculation and conjecture to arrive at such a figure, illustrating the insufficiency of the damages evidence on damages.

Columbia's challenge to the jury's verdict on damages is therefore directed at the accuracy of the amount of damages and not the fact of damages. Columbia's argument, in essence, is that Leitzinger's testimony alone was insufficient for the jury to have accurately fixed Plaintiffs' damages.

The district court, rejecting Columbia's argument, explained:

> In sum, Leitzinger testified that, if a conspiracy to depress prices via customer allocation existed during the alleged period, it would have uniformly impacted the relevant scrap metal market, and that impact would

> have been one that was shared in common by *all* of the ferrous generators. He went on to testify that the uniform injury experienced by *all* of the ferrous class members was a 16.4% undercharge during the conspiracy period. Further, Leitzinger testified that the undercharge experienced by the named Plaintiffs specifically was 16.4% as well.
>
> . . . .
>
> *If credited,* therefore, Leitzinger's testimony clearly established evidence of injury to the named Plaintiffs and the class as a whole, and measurable damages to the named Plaintiffs and the class as a whole. . . . If the jury credited Leitzinger's conclusions—in whole or in part—it reasonably could have reached the conclusions that it did.

In re Scrap Metal, 2006 WL 2850453, at *17-18.

We agree. First, a jury is entitled to award damages in an antitrust case based on expert testimony. *See Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 572 (1990) (holding that "expert testimony . . . provided a sufficient basis for an acceptable estimate of the amount of damages"). Second, "[t]he antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections." *South-East Coal Co. v. Consol. Coal Co.*, 434 F.2d 767, 794 (6th Cir. 1970). Once liability is established, therefore, a plaintiff's proof of damages is evaluated under a more lenient standard. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567

(1981). As the Supreme Court has stated in explaining its "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury," *id.* at 565, "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *Id.* at 566-67 (quoting *Hetzel v. Baltimore & Ohio R.R.*, 169 U.S. 26, 39 (1898)). "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Further, "the fact that the jury chose to assess damages in an amount substantially below that recommended by plaintiff's expert does not mean that the evidence offered in support of lost profits was inadequate as a matter of law." *Falls Steel Tube & Mfg. Co. v. Trumark, Inc.*, No. 94-3981, 1995 WL 750541, at *3 (6th Cir. 1995) (per curiam) (explaining that even though defendant identified weaknesses in the evidence of damages, "we do not find it to be so 'speculative or remote' that the matter should have been taken from the jury"). *See also Rodney v. Nw. Airlines, Inc.*, 146 F. App'x 783, 791 (6th Cir. 2005) ("A plaintiff need not calculate a specific damage figure so long as he proposes an acceptable method for calculating damages.").

We conclude that Leitzinger's testimony is sufficient to support the jury's damage award.

2. Fluid Recovery

Columbia further argues that the jury's verdict represents an "impermissible fluid recovery" because the jury was only permitted to return a lump-sum verdict for ferrous generators as a group without determining the damages incurred by individual class

members. Columbia's argument again is premised on its disagreement with Leitzinger's finding that every ferrous scrap sale in the class period had been depressed at the same rate (16.4 percent). Because the jury returned a verdict in an amount less than Leitzinger's estimated damages, Columbia argues that there is no basis for concluding that the jury accepted Leitzinger's premise that the alleged conspiracy had a uniform impact. In other words, Columbia states that it is impossible to figure out how the jury reached its verdict or to which class members the verdict applies and in what amounts. Columbia therefore asserts that the verdict is an impermissible fluid recovery.

Columbia, however, confuses the concept of fluid recovery with aggregate damages. "Fluidrecovery refers to the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of the class." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525 (S.D.N.Y. 1996). *See also Schwab v. Philip Morris USA, Inc.*, No. CV 04-1945, 2005 WL 3032556, at *1 (E.D.N.Y. 2005) ("Recoveries described as 'fluid' include distribution of damages through price reductions rather than by cash to individual plaintiffs; distribution of settlement or damage funds left unclaimed by individuals to nonprofit organizations or to states for uses intended to benefit class members; and distribution of damages calculated on a classwide basis to individual plaintiffs or through various indirect means." (internal citations omitted)). Indeed, the cases on which Columbia relies involved scenarios where damages could not be returned to any meaningful number of class members, and the plaintiffs accordingly proposed a fluid recovery.

Here, Plaintiffs did not propose a fluid recovery; instead they provided evidence of a classwide *aggregate* injury. "Damages in an antitrust class action may be determined on a classwide, or aggregate, basis, without resorting to fluid recovery where the [evidence] . . . provide[s] a means to distribute damages to injured class members in the amount of their respective damages." *In re NASDAQ*, 169 F.R.D. at 526. Leitzinger produced evidence supporting an aggregate recovery because *each* Plaintiff suffered a 16.4 percent undercharge. Leitzinger testified that the scrap metal market was well-functioning so as to distribute the effect of an antitrust violation equally across class members. The jury accepted Leitzinger's uniform-impact theory and awarded aggregate damages based on the injury to each class member. That the jury awarded a lower amount than Leitzinger suggested does not mean that it rejected Leitzinger's uniform-impact theory; instead, the jury may have simply rejected the undercharge amount of 16.4 percent.

C. Class Certification

Columbia argues that the district court erred in certifying a class and allowing the trial to proceed as a class action because (1) the "predominance of common questions" requirement of Rule 23(b)(3) was not met, and (2) Plaintiffs did not satisfy the notice requirement of Federal Rule of Civil Procedure 23(c)(2)(B). "The district court's decision *certifying* the class is subject to a 'very limited' review and will be reversed 'only upon a strong showing that the district court's decision was a clear abuse of discretion.'" *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004)

(quoting *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001)).

1. Predominance of Common Questions

Columbia contends that Plaintiffs did not meet the "predominance of common questions" requirement of Rule 23(b)(3) because damages could not be calculated on a class-wide basis.

In addition to the prerequisites of Rule 23(a)—numerosity, commonality, typicality, and fair representation—Rule 23(b) requires that (1) questions common to the class predominate over questions affecting only individual members, and (2) class resolution is superior to alternative methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Put differently, the proposed class must be "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

Columbia erroneously assumes that the issue of damages must predominate. To the contrary, "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws," *Amchem*, 521 U.S. at 625, because proof of the *conspiracy* is a common question that is thought to predominate over the other issues of the case. 7AA Wright & Miller § 1781. Indeed, we have never required a precise mathematical calculation of damages before deeming a class worthy of certification. *See Olden*, 383 F.3d at 508 (affirming class certification where liability could be determined for the class as a whole, despite individual issues of damages). Thus, even where there are individual variations in damages, the

requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("[T]he mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action isimpermissible.").

Here, the district court found that the "*allegations* of price-fixing and market allocation . . . will not vary among class members." (JA 263 (emphasis added).) Accordingly, the court found that the "fact of damages" was a question common to the class even if the amount of damages sustained by each individual class member varied. *See Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) ("[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues") (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001)); *see also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) (explaining that although damages calculation in antitrust action may involve some individualized issues, "it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"). We, therefore, find no error in the district court's analysis.

2. Notice

Columbia next argues that Plaintiffs failed to inform sufficiently absent class members of "the

binding effect of a class judgment." Fed. R. Civ. P. 23(c)(2)(B). In April 2004, the district court issued a Notice of Class Determination and Proposed Partial Settlements (hereinafter, "Notice"). Columbia did not object to this Notice until January 2006, three days before the scheduled trial. Without commenting on Columbia's dilatory decertification motion, we conclude that the district court did not abuse its discretion in determining that the Notice was adequate.

In three distinct places, the Notice informed class members of the effects of remaining a member of the class. First, contrary to Columbia's contention that the Notice focused exclusively on the agreements with the settling defendants, it concisely and clearly informed class members that "[w]hether or not the settlements . . . are approved, the litigation will continue against the non-settling defendants." (JA 283.) Second, the Notice specified the binding effect of both the proposed settlement and any future lawsuit by advising class members of the need to opt out in order to "pursue any claims against any defendants." (JA 283.) Third, the Notice informed the class members that by opting out of the class and the proposed settlements, they would not be bound by a judgment: "You will be excluded from the Class Plaintiffs' prosecution of the claims against all defendants . . .[and] you may present any claim you may have against . . . any other defendant by filing your own lawsuit." (JA 291-92.) Thus, the Notice was adequate in form and content to satisfy the requirements of the Federal Rules and due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (class notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and

afford them an opportunity to present their objections").

D. Jury Instructions

Columbia contends that the trial court erred when it instructed the jury on tolling and the applicable statute of limitations. We review a district court's jury instructions for abuse of discretion. *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007). "A judgment may be reversed based upon an improper jury instruction only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* (internal quotations and citations omitted).

Antitrust actions are subject to a four-year statute of limitations, meaning of course, that suit must be brought within four years after the cause of action accrued. 15 U.S.C. § 15(b). A cause of action, however, does not necessarily "accrue" when the defendant commits the act causing the plaintiff's injury, but may be tolled until the plaintiff discovers or should have discovered the injury. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971). For instance, acts of fraudulent concealment by the defendant toll the limitations period for as long as the concealment continues. *Norton Children's Hosp., Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 443 (6th Cir. 1981). In addition, pursuant to 15 U.S.C. § 16(i), the limitations period is tolled during the pendency of related criminal or civil proceedings by the government, plus an additional one-year period thereafter.

Plaintiffs filed suit on August 15, 2002. Columbia asserts, therefore, that August 15, 1998 is the date on

or after which Plaintiffs must establish Columbia's participation in the alleged conspiracy. The district court, however, suspended the limitations period pursuant to 15 U.S.C. § 16(i) and instructed the jury that it could consider Defendants' acts four years prior to March 2000, based on ongoing, related government proceedings beginning at that time. The district court's ruling meant that the jury could consider Defendants' conduct as of March of 1996. The district court also gave a fraudulent concealment instruction allowing the jury to alter further the dates in consideration, if it found the requisite elements. Columbia claims that both of these instructions were erroneous. Because we conclude that the jury could have reached the verdict based on the fraudulent concealment theory, we do not reach Columbia's objection to the statutory tolling instruction.

The district court gave the following fraudulent concealment instruction:

> To establish fraudulent concealment as to a specific defendant in this case, plaintiffs must prove each of the following elements by a preponderance of the evidence:
>
> (1) First, that the members of the conspiracy actively concealed the alleged conduct that caused plaintiff's antitrust injuries. It is not enough for plaintiffs to show that the members of the conspiracy failed to disclose the alleged conduct; rather plaintiffs must prove that they took active and affirmative steps to prevent plaintiffs from learning about the alleged conduct, such as by keeping their

meetings or agreements secret from their accounts or taking steps to conceal the fact of their non-competition; and

(2) Second, that plaintiffs failed to discover the fact of the unlawful conspiracy; and

(3) Third, that plaintiffs exercised reasonable diligence in the circumstances and still did not discover the alleged conduct.

In deciding whether plaintiffs have proved fraudulent concealment by the alleged conspirators, you may consider a number of factors. First, the law recognizes that a conspiracy is, by nature, self-concealing. Thus, you may consider the very acts giving rise to the conspiracy when deciding whether it was concealed from the plaintiffs; there is no requirement that the affirmative acts of concealment be independent of the conspiracy itself. You may also consider other activities which operate to conceal anti-competitive conduct such as prearranged or phone bids, confining knowledge of any anti-competitive activity to a limited core group of individuals, engaging in clandestine meetings or using false identities . . . .

[A]s with other acts in a conspiracy, any affirmative acts of concealment by one conspirator are chargeable to all you find to have been members of the conspiracy. Similarly, plaintiffs need not establish concealment on a victim-by-victim basis; affirmative acts of

> concealment generally are considered to have an industry-wide effect.
>
> If you find that plaintiffs have proven each of the elements of fraudulent concealment, then you may find that the doctrine of fraudulent concealment applies to plaintiffs' claims. In that event, plaintiffs may then seek to recover damages from the date of the earliest injury that you find they suffered, if any. If you find that plaintiffs have *failed to prove any one of these elements*, then you are *limited to the post-March 1996 time period* outlined in the previous "affirmative defense" instruction.

(JA 1033-34.) Columbia argues that the court erred by instructing the jury, in the foregoing emphasized language, that it could find fraudulent concealment or apply statutory tolling (with the earliest date of consideration in March 1996), instead of stating that the jury could find fraudulent concealment, statutory tolling, *or* find that *neither* applied (meaning the earliest date of consideration would be August 1998). Because the jury heard evidence based upon which it could have found fraudulent concealment even *before* 1996 and lasting through 1998, we conclude that any error in the jury instructions is harmless. *See United States v. Rayborn*, 491 F.3d 513, 520 (6th Cir. 2007) ("Even assuming *arguendo* that the instruction was given in error, 'a legally-erroneous jury charge will not justify reversal of a conviction if its probable effect on the verdict was inconsequential.'") (quoting *United States v. Carney*, 387 F.3d 436, 449 (6th Cir. 2004)).

Columbia argues that some of the evidence of fraudulent concealment should not apply to it because

it was based on acts taken by other Defendants. Fraudulent concealment, however, may be established through the acts of co-conspirators. *See Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1493 (D.C. Cir. 1989) ("affirmative acts of concealment by one or more of the conspirators can be imputed to their co-conspirators for purposes of tolling the statute of limitations"); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1084-85 (2d Cir. 1988) (same). Columbia cites no authority to support its argument that fraudulent concealment must be shown in relation to each plaintiff in a class action.

Finally, Columbia argues that the district court erred by instructing that "the law recognizes that a conspiracy is, by nature, self-concealing." Indeed, in the law of this Circuit, a plaintiff seeking to invoke the doctrine of fraudulent concealment in order to toll the statute of limitations in an antitrust case must prove "affirmative acts" of concealment; "concealment by mere silence is not enough." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1467 (6th Cir. 1988) (citation omitted). The district court's instruction, however, stated accurately this standard in its instruction: "It is not enough for plaintiffs to show that the members of the conspiracy failed to disclose the alleged conduct; rather plaintiffs must prove that they took active and affirmative steps to prevent plaintiffs from learning about the alleged conduct . . . ." (JA 1033.)

Therefore, we find no abuse of discretion.

III. CONCLUSION

For these reasons, we **AFFIRM**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-4511

[Filed May 15, 1008]

In re: SCRAP METAL	)
ANTITRUST LITIGATION	)
	)

Before: BATCHELDER, COLE, and SUTTON, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED in its entirety.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NUMBER: 1:02CV844

[Filed February 10, 2006]

PROFILE GRINDING, et al.,)
)
v.)
)
COLUMBIA NATIONAL)
GROUP, et al.)
)

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

It is ordered and adjudged that judgment is hereby entered in favor of the plaintiffs and against defendant Columbia Iron & Metal Company in the amount of $23,036,000.00 ($11,500,000.00 trebled per 15 U.S.C. 15(a) to $34,500,000.00, then offset by $11,464,000.00 per other settlements). Plus fees and costs, to be

determined through post-judgment submissions relating thereto.

February 10, 2006	Geri M. Smith
Date	*Clerk*

/s/_____
(By) Deputy Clerk Christine M. Huth

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-4511

[Filed October 20, 2008]

IN RE: SCRAP METAL ANTITRUST LITIGATION)

ORDER

BEFORE: BATCHELDER, COLE, and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Judge Moore recused herself from participation in this ruling.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green
Clerk

APPENDIX D

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15(a)

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a

reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * *

15 U.S.C. § 15b

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 4, 4A, or 4C [15 USCS §§ 15, 15a, 15c] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 16(i)

§ 16. Judgments

* * *

(i) Suspension of limitations. Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A [15 USCS § 15a], the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 or 4C [15 USCS §§ 15, 15c] is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

APPENDIX E

Fed. R. Civ. P. 23 (b)(3), (c), (d) and (e)

Rule 23. Class Actions

* * *

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must

clearly and concisely state in plain, easily understood language:

(i) the nature of the action;
(ii) the definition of the class certified;
(iii) the class claims, issues, or defenses;
(iv) that a class member may enter an appearance through an attorney if the member so desires;
(v) that the court will exclude from the class any member who requests exclusion;
(vi) the time and manner for requesting exclusion; and
(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;
(ii) the proposed extent of the judgment; or
(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

* * *

APPENDIX F

Jury Instruction on Statutory Tolling

In this case, the law imposes a four year limit on the plaintiffs' claim, which limit dates backward from March of 2000. Thus, unless the statute of limitations is tolled or extended for the reasons described in the Court's next instruction [on fraudulent concealment], the plaintiff may only prevail ... in the alleged conspiracy on or after March of 1996, and may only recover damages arising from conduct occurring after that date.

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FEB 2 6 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-934

In The Supreme Court of the United States

COLUMBIA IRON & METAL CO.,
Petitioner,

v.

LINCOLN ELECTRIC COMPANY, AND PROFILE GRINDING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Was the Sixth Circuit required to vacate the jury's verdict on the basis of an alleged instructional error where the appellant failed to argue prejudice and the record demonstrates that any error was harmless?

2. Did the trial court abuse its discretion by denying a motion to decertify a class filed on the eve of trial and based upon a challenge to the wording of a class notice that was issued without objection?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Lincoln Electric Company ("Lincoln Electric") and Profile Grinding Inc. ("Profile Grinding") make the following disclosure:

Lincoln Electric and Profile Grinding have no parent companies and no publicly-held company has a 10% or greater ownership interest in Lincoln Electric or Profile Grinding.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

1. The Statute of Limitations 4

A. Fraudulent Concealment 4

B. Statutory Tolling 6

2. Class Notice 10

REASONS FOR DENYING THE WRIT 12

I. THE APPELLATE COURT'S ROUTINE APPLICATION OF THE HARMLESS-ERROR DOCTRINE DOES NOT MERIT REVIEW. 12

A. This Court Has Explicitly Rejected the "Must Have" Standard Petitioner Advances. 12

B. Petitioner Selectively Reads the Appellate Court's Decision Below to Invent a Conflict 18

C. Even If The "Conflict" Were Real, This Is Not An Appropriate Case For This Court's Review 19

II. PETITIONER'S QUIBBLE WITH THE WORDING OF THE CLASS NOTICE DOES NOT MERIT REVIEW 22

CONCLUSION 25

APPENDIX

Appendix A: Order Preliminarily Approving Proposed Settlements With BMI and Weingold Defendants, Clarifying The Class Definition, Authorizing Notice To The Class, And Setting A Hearing Date, dated May 20, 2004 . . . . . 1b

Appendix B: Excerpt of Transcript of Proceedings, dated January 24, 2006 . . . . . 6b

Appendix C: District Court Order, dated September 30, 2006 . . . . . 11b

TABLE OF AUTHORITIES

Cases

Asbill v. Housing Auth. of Choctaw Nation,
726 F.2d 1499 (10th Cir. 1984) 18, 21

Bruneau ex rel. Schofield v. South Kortright Cent. School Dist.,
163 F.3d 749 (2d Cir. 1998) 17

Chapman v. California,
386 U.S. 18 (1967) 14

Collum v. Butler,
421 F.2d 1257 (7th Cir. 1970) 18

Connors v. McNulty,
697 F.2d 18 (1st Cir. 1983) 17

Cramer v. United States,
325 U.S. 1 (1945) 15

Davis v. Rennie,
264 F.3d 86 (1st Cir. 2001) 17

Dillard & Sons Constr. v. Burnup & Sims Comtec,
51 F.3d 910 (10th Cir. 1995) 21

Eastern Trading Co. v. Refco, Inc.,
229 F.3d 617 (7th Cir. 2000) 9

Fillippon v. Albion Vein Slate Co.,
250 U.S. 76 (1919) 16

Flanigan v. Burlington Northern Inc.,
632 F.2d 880 (8th Cir. 1980) 20

Gen. Ind. Corp. v. Hartz Mountain Corp.,
810 F.2d 795 (8th Cir. 1987) 9

Harmsen v. Smith,
693 F.2d 932 (9th Cir. 1982) 25

Hedgpeth v. Pulido,
--- U.S. ----, 129 S.Ct. 530 (2008) ..... *passim*

Hurley v. Atlantic City Police Dept.,
174 F.3d 95 (3d Cir. 1999) 17

Kossman v. Northeast Ill. Reg. Commuter R.R. Corp.,
211 F.3d 1031 (7th Cir. 2000) 9

Marine Firemen's Union v. Owens-Corning Fiberglass Corp.,
503 F.2d 246 (9th Cir. 1974) 22

Massachusetts Eye And Ear Infirmary v. QLT Phototherapeutics, Inc.,
552 F.3d 47 (1st Cir. 2009) 16

Minks v. Polaris Indus., Inc.,
546 F.3d 1364 (11th Cir. 2008) 20

Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.,
175 F.3d 1221 (10th Cir. 1999) 9, 17, 20

Morrissey v. Nat'l Maritime Union of Am.,
544 F.2d 19 (2d Cir. 1976) 21

Neder v. United States,
527 U.S. 1 (1999) 14, 15

New Jersey v. Morton Salt Co.,
387 F.2d 94 (3d Cir. 1967) 22

New York Univ. v. Planet Earth Found,
163 Fed. Appx. 13 (2d Cir. 2005) 20

Nieves-Villanueva v. Soto-Rivera,
133 F.3d 92 (1st Cir. 1997) 20

People v. Pulido,
15 Cal.4th 713 (1997) 13

Pivirotto v. Innovative Systems, Inc.,
191 F.3d 344 (3d Cir. 1999) 16

Pope v. Illinois,
481 U.S. 497 (1987) 14

Pulido v. Chrones,
487 F.3d 669 (9th Cir. 2007), *cert. granted*,
128 S.Ct. 1444 (2008). 13

Pulido v. Lamarque, No. C 99-4933 CW (PR),
2005 WL 6142229 (N.D. Cal., Mar. 24, 2005) . 13

Renz v. Grey Adver., Inc.,
135 F.3d 217 (2d Cir. 1997) 16

Rose v. Clark,
478 U.S. 570 (1986) 14

Rosebud Sioux Tribe v. A & P Steel, Inc.,
733 F.2d 509 (8th Cir. 1984) 16

Stromberg v. California,
283 U.S. 359 (1931) 13, 14, 15

Terminiello v. City of Chicago,
337 U.S. 1 (1949) 15

Traver v. Meshriy,
627 F.2d 934 (9th Cir. 1980) 18

United States v. Palazzolo,
71 F.3d 1233 (6th Cir. 1995) 15

United States v. Rayborn,
491 F.3d 513 (6th Cir. 2007) 18

Vaughter v. Eastern Air Lines, Inc.,
817 F.2d 685 (11th Cir. 1987) 24

Webber v. Soba,
322 F.3d 1032 (8th Cir. 2003) 20

Wellington v. Daniels,
717 F.2d 932 (4th Cir. 1983) 17

West Knoxville Assocs. Ltd. Pshp. v. Ticor Title Ins. Co., No. 95-9531,
1997 U.S. App. LEXIS 23942 (6th Cir. Tenn. Sept. 9, 1997) 21

Williams v. North Carolina,
317 U.S. 287 (1942) 15

Yates v. United States,
354 U.S. 298 (1957) 13, 14, 15

Young v. Katz,
447 F.2d 431 (5th Cir. 1971) 25

Zenith Radio Corp. v. Hazeltine Research, Inc.,
401 U.S. 321 (1971) 21

Statutes and Rules

15 U.S.C. § 1 2

15 U.S.C. § 16(i) 6

28 U.S.C. § 2111 16

Fed. R. Civ. P. 23 ..... 10, 23, 24

Fed. R. Civ. P. 61 16

INTRODUCTION

The petition raises no issue meriting review by this Court. In *Hedgpeth v. Pulido*, --- U.S. ----, 129 S.Ct. 530, 532 (2008) (*per curiam*), a case Petitioner ignores, this Court explicitly rejected the argument presented here: that a general verdict must be reversed unless the reviewing court finds with "absolute certainty" that the verdict rested on a valid theory of liability rather than an alternative and purportedly invalid theory. As *Pulido* confirmed, alternative-theory instructional error does not warrant reversal absent a showing of prejudice. Here, Petitioner failed to argue to the trial court or to the appellate court that the error it alleged in an instruction on the statute of limitations prejudiced its substantial rights and the record amply demonstrates that any error was harmless. Petitioner fails to demonstrate a conflict on an important question of federal law or even a wrong result in this case. The Sixth Circuit's decision represents an unremarkable application of harmless-error analysis to the particular facts presented and does not merit review.

Petitioner's quibble with the wording of the notice issued to the class likewise fails to raise any issue warranting review. The petition does not identify any circuit split or any misstatement of law in the decisions below. Moreover, Petitioner delayed raising any objection to the notice until the very eve of trial, almost two years after the notice issued. Applying the proper legal standard, the Sixth Circuit made the fact-based determination that the trial court acted within its discretion in denying Petitioner's motion for decertification. Petitioner's argument is case-specific, insubstantial, and without merit.

STATEMENT OF THE CASE

This case arises from a combination and conspiracy among scrap metal dealers in Northeast Ohio to allocate markets, rig bids and fix prices paid for scrap metal generated by and purchased from the named plaintiffs and the class. Beginning in March of 2000, the United States Department of Justice initiated a series of proceedings against the conspirators resulting in the convictions of seven individuals and companies for criminal violations of Section One of the Sherman Act, 15 U.S.C. § 1.

Respondents filed a civil lawsuit on behalf of themselves and a class of similarly situated scrap generators alleging that, beginning at least by 1992, defendants entered an agreement to restrain trade in violation the Sherman Act. Respondents amended their complaint on August 15, 2002 and added Petitioner, Columbia Iron and Metal Company, as a defendant. Five members of the conspiracy settled with Respondents prior to trial.

The trial spanned eleven days and included testimony from twenty-five witnesses. As the trial court described, the trial included:

> [a] plethora of testimony from numerous ... employees [of Petitioner] and third parties in the industry. Most significantly, these witnesses ... testified that "unwritten" agreements existed between [Petitioner] and other scrap dealers not to compete with one another, so much so that various competitors would complain to [Petitioner's] chief executive, David Miller, if [Petitioner] bid on an account that "belonged" to

> another scrap dealer. Indeed, the evidence from which the jury reasonably could have concluded that [Petitioner] generally participated in the alleged conspiracy is staggering.

(App. at 40b).[1]

The jury heard expert testimony from both sides concerning the computation of damages. Respondents' expert testified that the named plaintiffs and the class were injured by the conspiracy and estimated that the class suffered $20.9 million in damages between 1992 and March of 2000. (JA at 1198-99).[2] Defendants' expert testified that he made two adjustments to the model used by Respondents' expert and, once those adjustments were made, the model resulted in estimated damages to the class of $1.9 million for the period between 1992 and March of 2000. (JA at 1253, 1274). Defendants' expert further testified that if the jury determined that only one of his two adjustments to the damages model was appropriate, the actual amount of damages to the class would lie somewhere between his estimate and the estimate of Respondents' expert. (JA at 1274-75).

The jury returned a split verdict, finding that of the three trial defendants only Petitioner was liable for violating the Sherman Act, and awarded $11.5 million in damages to the class. As Petitioner stated in its

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[1] Petitioner's appendix does not include the opinions and orders of the trial court relevant to its arguments as required by Rule 14.1. The omitted materials are in the attached appendix, referred to as "App." herein.

[2] "JA" refers to the Joint Appendix on appeal.

Motion for a New Trial "[t]hat amount was obviously derived by splitting the difference between [Respondents'] calculation of damages and [defendants'] correction of that calculation." (JA at 1070). Although Petitioner now argues that the amount of the verdict suggests that the jury awarded damages only for the post-1996 time period, no witness testified to the amount of damages computed on an annual basis and no witness testified to the amount of damages estimated for the post-1996 time period. Moreover, Petitioner never argued to the jury that, if it awarded damages, it should limit its award to the post-1996 time period.

1. The Statute of Limitations

A. Fraudulent Concealment

Respondents alleged that the defendants fraudulently concealed their illegal activities and that the conspiracy was not discovered despite the exercise of reasonable diligence until the first criminal indictment was announced in March of 2000. Overwhelming and undisputed evidence introduced at trial established that the conspiracy was fraudulently concealed, including:

- Testimony and exhibits demonstrating that the conspirators printed letterhead with the fictitious names of companies and submitted fraudulent bids on that letterhead. (JA at 1237-38, 1379-80, 1426);

- Testimony and exhibits demonstrating that the conspirators concealed the common ownership

of companies to create the illusion of competition. (JA at 1161-62, 1174, 1576);

- Testimony and exhibits demonstrating that the conspirators routinely submitted fraudulent bids to create the illusion of competition, including numerous instances recounted in plea agreements. (JA at 1135-36, 1520-21, 1634-35);

- Testimony from Petitioner's Chairman that it was his practice to conceal his meetings with conspirators from his own Chief Financial Officer and Manager. (JA at 1171).

Unrebutted testimony further established that Respondents exercised reasonable diligence and yet did not discover the conspiracy prior to March of 2000. (JA at 1235).

In closing, Respondents argued to the jury that it should find fraudulent concealment and recounted the undisputed evidence. (Tr. 1899:2-1900:4, 1995:10-13).[3] Defendants' closing arguments made no mention at all of fraudulent concealment or the statute of limitations.

In its post-trial motions, Petitioner listed over twenty purported grounds for a new trial or judgment as a matter of law without substantive argument or support. (*See* App. at 20b-21b). In those motions, Petitioner failed to raise any argument about the fraudulent concealment instruction or the sufficiency of the evidence supporting fraudulent concealment. (*See* JA at 1057-1074).

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[3] "Tr." refers to the trial transcript.

B. Statutory Tolling

Pursuant to Section 5(i) of the Clayton Act, 15 U.S.C. § 16(i), the statute of limitations was tolled as of March of 2000. On that date, the United States government filed its first information against a member of the scrap metal conspiracy, Bay Metal, Inc. *United States v. Bay Metal*, 1:00-CR-130 (N.D. Ohio). By the beginning of the civil trial, the government had initiated proceedings against six additional conspirators. The most recent government proceeding was initiated in February of 2008. *United States v. Alliance Nat'l Ltd Partnership*, 1:08-CR-68 (N.D. Ohio).

The trial court instructed the jury that the four-year statute of limitations dated backward from March of 2000 and, unless the jury found that the limitations period was tolled by fraudulent concealment, the jury could consider evidence of liability and damages only for the period beginning in March of 1996. (Pet. App. at 49a). In its Motion for a New Trial, Petitioner argued that the statute of limitations instruction contained an error and that the jury should have been instructed that, unless it found fraudulent concealment, it could consider evidence of liability and damages only for the period beginning in May of 1997. (JA at 1068). Petitioner did not, however, argue that the purported error was prejudicial.

Respondents opposed Petitioner's motion and cited authority establishing that the statute of limitations, once tolled by government action, remains tolled until the last action against all defendants is resolved. (Class Plaintiffs' Consolidated Opposition to Columbia

Iron's Motion for Judgments as a Matter of Law and a New Trial, Docket Entry 653, at 40-41). Respondents further argued that any error in the limitations instruction was immaterial in light of Petitioner's failure to dispute that the limitations period was tolled by fraudulent concealment. (*Id.* at 41). In its reply in support of its motion, Petitioner failed to respond to Respondents' arguments that there was no error and failed to argue that the purported error prejudiced its substantial rights. (App. at 71b; *See* JA at 1076-1119). The trial court determined that there was no error in the instruction, finding that "the [intial] case was simply the first of several actions brought by the government ... each of which implicated § 16(i) for the same reason." (App. at 70b-71b).

Petitioner renewed its argument that the statute of limitations instruction contained an error on appeal but argued that the earliest critical date for the limitations period was August of 1997 rather than May of 1997. (Pet. Br. at 55).[4] Petitioner's argument to this Court ignores the subsequent government proceedings and Petitioner's prior arguments in favor of critical dates other than August of 1998.

On appeal, Petitioner's argument that the instructional error warranted reversal consisted of a single sentence:

> "[E]rror in either [the statute of limitations or fraudulent concealment instruction] standing alone would require reversal, even if the other

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[4] "Pet. Br." refers to the Brief for Appellant, the Petitioner, filed in the Sixth Circuit.

> had been correct, for the court's Verdict Form did not reveal which form of tolling was applied by the jury."

(*Id.* at 53). Petitioner did not argue that the error was prejudicial in light of the case presented at trial.

Respondents replied that the trial court's statute of limitations instruction was correct. (App. Br. at 52-55).[5] Respondents also argued that, in light of the evidence and arguments at trial, any error was harmless. (*Id.* at 56-57). In support of their harmless-error argument, Respondents provided extensive citations to the unrebutted evidence and undisputed arguments at trial. (*Id.* at 8-9). Petitioner once again failed to respond to the harmless-error argument in its reply brief.

In a unanimous opinion, the Sixth Circuit declined to review the statute of limitations instruction, holding that "[b]ecause the jury heard evidence upon which it could have found fraudulent concealment even *before* 1996 and lasting through 1998, we conclude that any error in the jury instruction is harmless." (Pet. App. at 34a) (emphasis in original).

Petitioner thereafter filed a petition for rehearing and suggestion of rehearing *en banc*, arguing that the alleged error in the statute of limitations instruction mandated reversal. In its petition for rehearing, Petitioner argued for the first time that reversal was required absent a finding that the jury "must have"

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[5] "App. Br." refers to the Brief for Appellees, the Respondents, filed in the Sixth Circuit.

relied on the fraudulent concealment instruction and "could not" have relied on the statute of limitations instruction.

In response, Respondents first argued that, in contrast to the cases cited by Petitioner, the jury in this case was not instructed on an invalid theory of liability. Rather, the jury was instructed on a valid affirmative defense - Petitioner's statute of limitations defense - that purportedly contained an error.[6] Second, Petitioner waived any right to argue that reversal was required under a "must have," "necessarily" or "absolute certainty" standard by failing to raise that standard in its appellate brief. Third, Petitioner waived any right to argue that it was prejudiced by the verdict form because it failed to request an interrogatory on fraudulent concealment and did not object to the verdict form on that basis.[7] Fourth, the Sixth Circuit correctly concluded, based on the undisputed facts and Petitioner's failure to argue the fraudulent concealment issue to the jury, that any error in the statute of limitations instruction could not have had more than an inconsequential effect on the

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[6] *See Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1236 (10th Cir. 1999) (distinguishing the submission of a legally invalid theory to a jury from a misstatement of the law on a viable theory).

[7] *See, e.g., Gen. Ind. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987) (because appellant did not challenge the general verdict form's wording at trial or on appeal, general verdict affirmed despite submission of invalid claim to jury); *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 622 (7th Cir. 2000) (same); *Kossman v. Northeast Ill. Reg. Commuter R.R. Corp.*, 211 F.3d 1031, 1037 (7th Cir. 2000) (same).

verdict and thus did not warrant review. Finally, Respondents argued that the instruction was correct.

The Sixth Circuit denied Petitioner's request for *en banc* review and panel rehearing. (Pet. App. at 37a-38a).

2. Class Notice

The trial court granted Respondents' Motion for Class Certification on March 31, 2004. Three weeks later, each defendant received service of a proposed combined "Notice of Class Determination and Proposed Partial Settlements and Hearing Regarding Settlements." (JA at 281-95). The notice informed class members of the effects of remaining in the class and of the necessity of opting out to pursue any claims against any defendant relating to the alleged conspiracy. Petitioner did not object to the proposed notice or respond to it in any way whatsoever.

The trial court found that the notice satisfied due process and Rule 23 of the Federal Rules of Civil Procedure and approved the notice for dissemination. (App. at 2b-3b). The notice was subsequently mailed to each member of the class without objection. Petitioner thereafter filed dispositive motions without raising any issues concerning the notice.

Almost two years later, on Friday January 20, 2006 at 7 p.m., with trial set to begin on Monday January 23, 2006, Petitioner moved to decertify the class, claiming that it had just discovered that the class notice was poorly worded and therefore inadequate. The trial court denied the motion to decertify the class, finding the timing "obviously improper." (App. at

8b-9b). Petitioner renewed its contention that the trial court should have decertified the class in its Motion for a New Trial, but did not provide any substantive argument in support of that issue. (App. at 64b-65b).

On appeal, the Sixth Circuit held that the trial court did not abuse its discretion in denying the motion for decertification. The Court further concluded that the notice:

> In three distinct places ... informed class members of the effects of remaining a member of the class. First... it concisely and clearly informed class members that "[w]hether or not the settlements... are approved, the litigation will continue against the non-settling defendants." Second, the Notice specified the binding effect of both the proposed settlement and any future lawsuit by advising class members of the need to opt out in order to "pursue any claims against any defendants." Third, the Notice informed the class members that by opting out of the class and the proposed settlements, they would not be bound by a judgment: "You will be excluded from the Class Plaintiffs' prosecution of the claims against all defendants... [and] you may present any claim you may have against... any other defendant by filing your own lawsuit." Thus, the Notice was adequate in form and content to satisfy the requirements of the Federal Rules and due process.

(Pet. App. at 30a).

REASONS FOR DENYING THE WRIT

I. THE APPELLATE COURT'S ROUTINE APPLICATION OF THE HARMLESS-ERROR DOCTRINE DOES NOT MERIT REVIEW.

Petitioner's principal argument is that the decision below conflicts with the precedent of this Court, and with certain decisions of the courts of appeals, because the Sixth Circuit applied the wrong standard to determine whether a purported error in a jury instruction warrants reversal. Petitioner invents this supposed conflict by ignoring controlling precedent, relying on outdated cases, and mischaracterizing the decision below. This issue does not merit review.

A. This Court Has Explicitly Rejected the "Must Have" Standard Petitioner Advances.

Petitioner argues that the Sixth Circuit departed from this Court's precedent in applying harmless-error analysis to the purported error in the statute of limitations instruction. According to Petitioner, reversal of a general verdict is required unless the reviewing court determines that the jury "must have" relied on a valid theory of liability and "could not" have relied on an alternative invalid theory. Even if Petitioner were correct that the error it claims in the statute of limitations instruction is akin to submitting an invalid theory of liability to the jury, the petition fails to raise any issue meriting review because the "must have" or "absolute certainty" standard advanced by Petitioner has been rejected by this Court.

In *Hedgpeth v. Pulido*, --- U.S. ----, 129 S.Ct. 530 (2008), this Court reviewed whether instructing a jury

on multiple theories of guilt, one of which is invalid, requires reversal of a general verdict without regard to whether the flaw in the instructions prejudiced the defendant. The defendant in *Pulido* was convicted of felony-murder pursuant to a general verdict. The instructions permitted the jury to find him guilty if he formed the intent to aid and abet the underlying felony either before or after the murder. On direct appeal, the state court agreed with the defendant that the after-the-crime theory was invalid as a matter of law, but affirmed the conviction on the ground that the defendant was not prejudiced by the error. *People v. Pulido*, 15 Cal.4th 713, 727 (1997). The defendant sought federal habeas relief, which the district court granted. *Pulido v. Lamarque*, No. C 99-4933 CW (PR), 2005 WL 6142229 (N.D. Cal., Mar. 24, 2005).

On the state's appeal, the Ninth Circuit held that instructing a jury on multiple theories of guilt, one of which is legally improper, requires setting aside a conviction unless the reviewing court can determine with "absolute certainty" that the defendant was convicted under a proper theory. *Pulido v. Chrones*, 487 F.3d 669, 676 (9th Cir. 2007) (*per curiam*). Because the instructions "le[ft] open the possibility that the jury convicted [the defendant] on the impermissible ground," the Ninth Circuit concluded that the verdict must be reversed. *Id.* This Court granted certiorari. 128 S.Ct. 1444 (2008).

Pulido first noted the general rule that "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Pulido*, 129 S.Ct. at 530 (citing *Stromberg v. California*, 283 U.S. 359 (1931) and *Yates v. United*

States, 354 U.S. 298 (1957)). However, the Court explained that both *Stromberg* and *Yates* were decided before *Chapman v. California*, 386 U.S. 18 (1967), in which this Court held that constitutional errors can be harmless. Accordingly, "neither *Stromberg* nor *Yates* had reason to address whether the instructional errors they identified could be reviewed for harmlessness, or instead required automatic reversal." *Pulido*, 129 S.Ct. at 532.

In a series of post-*Chapman* cases, this Court concluded that various forms of instructional error are subject to harmless-error review. *See, e.g., Neder v. United States*, 527 U.S. 1 (1999) (omission of an element of an offense); *Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of an element of an offense); *Rose v. Clark*, 478 U.S. 570 (1986) (erroneous burden-shifting as to an element of an offense). As *Pulido* explained:

> Although these cases did not arise in the context of a jury instructed in multiple theories of guilt, one of which is improper, nothing in them suggests that a different harmless-error analysis should govern in that particular context.... In fact, drawing a distinction between alternative-theory error and ... [other] instructional errors would be patently illogical, given that such a distinction reduces to the strange claim that, because the jury ... received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than ... where the only charge on the critical issue was a mistaken one.

Pulido, 129 S.Ct. at 532 (internal citations omitted).

As the *Chapman* line of cases establishes, "harmless-error analysis applies to instructional errors so long as the error at issue does not categorically vitiate *all* the jury's findings." *Id.* (quoting *Neder*, 527 U.S. at 11) (internal quotation marks omitted) (emphasis in original). Because alternative-theory instructional error "no more vitiates all the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted," such errors warrant reversal only if prejudice is demonstrated in light of the case presented. *Id.* Moreover, *Pulido* explicitly rejected the substitution of an "absolute certainty" test for a demonstration of prejudice because "[s]uch a determination would appear to be a finding that no violation had occurred at all, rather than that any error was harmless." *Id.*, 533.

The petition fails to even acknowledge, much less distinguish, *Pulido*. To the contrary, Petitioner argues that *Yates* and *Stromberg* establish the proper standard of review for alternative-theory instructional error despite this Court's explicit rejection of that argument in *Pulido*.[8] And Petitioner asserts a conflict based on the Sixth Circuit's departure from a supposed standard that has unequivocally been declared invalid by this Court.

Any attempt to distinguish *Pulido* would fail in any event. Harmless-error analysis is required in all civil

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[8] Cases cited by Petitioner likewise rely on *Yates* and *Stromberg* and are outdated. *See Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949); *Cramer v. United States*, 325 U.S. 1, 36 n. 45 (1945); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *United States v. Palazzolo*, 71 F.3d 1233, 135-37 (6th Cir. 1995).

cases, just as it is in habeas cases. *See* Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights"); 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties"'). This Court has long held that erroneous jury instructions in civil cases "furnish ground for reversal unless it affirmatively appears that they were harmless." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919).

Accordingly, the lower federal courts universally have held that an instructional error does not warrant reversal unless a review of the record as a whole demonstrates that the error prejudiced the appellant's substantial rights. *See, e.g., Massachusetts Eye And Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 73 (1st Cir. 2009) ("An error in jury instructions warrants reversal only if the error is determined to have been prejudicial based on a review of the record as a whole"); *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 358 (3d Cir. 1999) (finding instructional error harmless because "we believe that in light of the entire record it is highly probable that the jury would have returned the same verdict"); *Renz v. Grey Adver., Inc.*, 135 F.3d 217, 223-24 (2d Cir. 1997) (finding that "upon a review of the evidence and testimony presented at trial" appellant had not demonstrated prejudice and affirming the verdict); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 517 (8th Cir. 1984) (reversal for instructional error is only proper if "the record as a whole including the allegations of the complaint, the evidence, and the remaining

instructions" evidences prejudice to substantial rights of party); *Connors v. McNulty*, 697 F.2d 18, 21 (1st Cir. 1983) ("The standard of review to be applied by this Court is quite clear: an error in jury instructions will mandate reversal of a judgment only if the error is determined to have been prejudicial, based on a review of the record as a whole"); *Wellington v. Daniels*, 717 F.2d 932, 938 (4th Cir. 1983) (same).

Presuming prejudice when one of two theories of liability is invalid, while requiring an affirmative demonstration of prejudice where the only liability instruction is tainted by legal error, is "patently illogical," inconsistent with the Federal Rules, and inconsistent with the harmless-error statute. Accordingly, even prior to *Pulido*, lower courts routinely applied harmless-error analysis to alternative-theory instructional errors in civil cases. *See, e.g., Davis v. Rennie*, 264 F.3d 86, 110 (1st Cir. 2001) ("we find that the erroneous submission to the jury of the claim of unreasonable restraint through the use of excessive force was harmless"); *Morrison Knudsen Corp.*, 175 F.3d at 1236 ("When sufficient evidence supports each theory submitted to a jury, an error in stating the law that governs one of the theories may be harmless"); *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 121 (3d Cir. 1999) (finding the submission of an invalid theory to the jury harmless in light of strength of the evidence supporting an alternative liability theory); *Bruneau ex rel. Schofield v. South Kortright Cent. School Dist.*, 163 F.3d 749, 760 (2d Cir. 1998) (holding that "absolute certainty" is not required under the general verdict rule and affirming verdict because "alternative explanations for the verdict" gave the court confidence that the error did not influence the outcome of the

trial); *Asbill v. Housing Auth. of Choctaw Nation*, 726 F.2d 1499, 1504 (10th Cir. 1984) ("As with all errors committed at trial, a litmus test for reversal [in multiple theory cases] is whether the appellant was thereby unjustly prejudiced"); *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980) (when one of multiple theories of liability is unsound, a "reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error"); *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970) (affirming verdict because "the results of the present trial would not have been substantially affected if these issues had not been submitted to the jury").

B. Petitioner Selectively Reads the Appellate Court's Decision Below to Invent a Conflict

Petitioner repeatedly argues that the Sixth Circuit declined to review the statute of limitations instruction on the grounds that the jury "could have" found that the conspirators fraudulently concealed their unlawful activities. The Sixth Circuit, however, concluded that the "the jury heard evidence upon which it could have found fraudulent concealment even *before* 1996 and lasting through 1998." (Pet. App. at 34a) (emphasis in original). Notably, any error in the statute of limitations instruction would be wholly immaterial if the jury found fraudulent concealment *beginning* in 1996.

The Sixth Circuit also quoted *United States v. Rayborn*, 491 F.3d 513, 520 (6th Cir. 2007): "Even assuming, arguendo that the instruction was given in error, a legally erroneous jury charge will not justify

reversal of a conviction if its probable effect on the verdict was inconsequential." (emphasis added). Thus, the Sixth Circuit determined that the error Petitioner complained of was harmless because it could not have had any appreciable effect on the verdict. Petitioner's characterization of the decision is misleading and designed to generate the appearance of a conflict where there is none.

C. Even If The "Conflict" Were Real, This Is Not An Appropriate Case For This Court's Review

Even if Petitioner could identify a real conflict - and it cannot - this case would be a poor candidate for resolving it. Petitioner did not argue prejudice to the trial court and did not reply to Respondents' arguments to that court that any error was immaterial in light of the undisputed fraudulent concealment evidence. Although Petitioner now argues that the trial record does not establish that the jury "must have" found the limitations period tolled by fraudulent concealment, Petitioner's sole argument on appeal was that reversal was required because "the court's Verdict Form did not reveal which form of tolling was applied by the jury." Even after Respondents provided extensive record citations and argued that any error in the statute of limitations instruction was harmless in light of that evidence, Petitioner failed to argue that the purported error resulted in prejudice or to provide any record citations that would support a finding of prejudice. No case cited by Petitioner requires

reversal in the absence of argument by the appellant that an error prejudiced its substantial rights.[9]

In any event, Petitioner's belated argument is entirely specious. According to the petition, the verdict should be reversed solely because the amount of the damage award is not facially inconsistent with the jury's rejection of fraudulent concealment. A review of the record as a whole, however, proves that there is no reasonable possibility that the jury relied on the statute of limitations instruction in rendering its verdict because the facts establishing fraudulent concealment were not disputed at trial.[10]

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[9] Federal courts have routinely held that the appellant has the burden of demonstrating prejudice and have affirmed judgments where the appellant failed to provide arguments or record citations establishing prejudice. *See, e.g., Minks v. Polaris Indus., Inc.* 546 F.3d 1364, 1380 (11th Cir. 2008) (holding that it need not review claim of error "because [appellant] makes no argument and cites no evidence to establish that any alleged error affected its substantial rights"); *New York Univ. v. Planet Earth Found*, 163 Fed. Appx. 13, 15 (2d Cir. 2005) (rejecting claims of error, including errors in jury instructions, without determining whether rulings were improper because appellant failed to demonstrate requisite harm); *Morrison Knudsen Corp.*, 175 F.3d at 1236 (affirming verdict where appellant failed to provide any argument or record citations demonstrating prejudice); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997) ("In a civil case, the party asserting error bears the burden of demonstrating that the error was harmful..."); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 889 (8th Cir. 1980) (concluding that the appellant has the burden of demonstrating prejudice resulting from instructional error).

[10] *Compare Webber v. Soba*, 322 F.3d 1032, 1038 (8th Cir. 2003) (finding that jury instruction on an invalid claim is not harmless where the evidence is capable of supporting a jury verdict for

Consequently, Petitioner did not argue to the jury that it should find for defendants on that issue. Petitioner also declined to offer any argument to the jury that damages, if awarded, should be limited to the post-1996 time period. And, as Petitioner previously admitted, the "obvious" explanation for the amount of the damage award is that the jury split the difference between the experts' estimates. The Sixth Circuit's factual determination that the purported error in the statute of limitations instruction was harmless is correct.

Finally, the underlying instruction was also correct given the ongoing criminal proceedings. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 333 n.5 (1971) (the running of the statute of limitations on an antitrust claim against a nonparty to a government action is tolled until one year after the entry of judgment or consent decree against the last

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either party on an alternative valid claim and the outcome depends largely on credibility determinations); *West Knoxville Assocs. Ltd. Pshp. v. Ticor Title Ins. Co.*, No. 95-9531, 1997 U.S. App. LEXIS 23942 at *29 (6th Cir. Sept. 9, 1997) (reversing because evidence supporting valid claim was "not overwhelming); *Dillard & Sons Constr. v. Burnup & Sims Comtec,* 51 F.3d 910, 916 (10th Cir. 1995) (concluding that an error was not harmless because jury heard voluminous disputed evidence on alternative theory); *Asbill*, 726 F.2d at 1504 (although submission of invalid claim to jury would be harmless if valid claim were strongly and clearly supported by the record, error was not harmless because jury could only have found for plaintiff on valid claim by resolving two "extremely close" factual questions in plaintiff's favor); *Morrissey v. Nat'l Maritime Union of Am.*, 544 F.2d 19, 27 (2d Cir. 1976) (finding the submission of invalid theory to the jury not harmless where jury was repeatedly urged to find for the appellee on the invalid theory).

remaining defendant); *Marine Firemen's Union v. Owens-Corning Fiberglass Corp.*, 503 F.2d 246, 249 (9th Cir. 1974) ("'pendency' of the government's criminal proceeding continues for a period of one year from and after the date of the entry of judgment of conviction against the last remaining defendant in the related criminal proceeding"); *New Jersey v. Morton Salt Co.*, 387 F.2d 94, 99 (3d Cir. 1967) (statute of limitations remains tolled until government proceedings against all defendants conclude).

As evidenced by Petitioner's ever-changing assertions concerning the proper critical date for the instruction, Petitioner does not have a meritorious argument that the statute of limitations instruction contained an error.

II. PETITIONER'S QUIBBLE WITH THE WORDING OF THE CLASS NOTICE DOES NOT MERIT REVIEW

Petitioner does not dispute that the Sixth Circuit applied the correct legal standard in finding that the class notice satisfied due process and the Federal Rules of Civil Procedure. Petitioner also does not argue that there is a split of authority, that the decision below conflicts with any decision of this Court, or that the problem that it identifies has ever occurred before or has any likelihood of recurring in the future. Instead, the petition presents an inherently case-specific factual dispute about the content of a class notice, which was issued without objection, and does not present any argument warranting the exercise of this Court's supervisory powers.

Petitioner frames its question as whether a trial court may "omit a Rule 23(c)(2)(B) notice" and "thereafter substitute a partial settlement notice under Rule 23(e)(1)(B) without including the admonition ... that a subsequent judgment ... would be binding on the class members." (Pet. at i). Petitioner's "question presented" is riddled with factual errors and omissions. The trial court did not "omit" a Rule 23(c)(2)(B) notice and "thereafter" substitute a partial settlement notice. To the contrary, the trial court issued a combined notice of class determination and partial settlement.

Although Petitioner attempts through artful phrasing to make the question it presents appear substantial, the defect it alleges in the notice is trivial. The combined notice informed class members of the effect of staying in the class and advised class members of the need to opt out in order to "pursue any claims against any defendants." Petitioner argues that review by this Court is warranted because a layman would "not *necessarily* understand" that staying in the class would preclude subsequent claims. (Pet. at 20) (emphasis added). In other words, Petitioner's argument is that the notice might not be *quite* clear enough.

Even if Petitioner had raised a question of substance rather than merely nitpicking the wording of the notice, this case is a decidedly poor vehicle to resolve any issues regarding the content of a class notice. Petitioner waived any right to argue that a combined notice was improper, or that the content or manner of notice was inadequate, by failing to object in a timely manner. Petitioner did not object to the proposed combined class notice before it was issued

and did not object to the trial court's order approving the content and manner of notice. The first time Petitioner raised any argument concerning the notice was in a motion for decertification, which was filed after Petitioner's dispositive motions were denied and three days before the trial. Consequently, Petitioner's appeal is from the denial of its motion for decertification rather than from the order approving the combined notice, which it did not oppose. The question presented by the petition is thus more aptly stated as: whether it is an abuse of discretion to deny a motion to decertify a class brought on the grounds that a class notice, which the movant did not object to, was a little too unclear.

Petitioner tries to add heft to this insubstantial and inherently case-specific issue by arguing that the trial court failed to comply with Rule 23(c)(3). According to Petitioner, the judgment did not "specify or describe those to whom the Rule 23(c)(2) notice was directed." Petitioner failed to make this argument to the trial court and has therefore waived any right to argue that the form of the judgment was improper. To the extent that Petitioner argues that the trial court should have decertified the class prior to trial because the subsequent judgment did not identify the recipients of the class notice, its argument must be rejected as circular and without authority.

In any event, the remedy for a defect in the form of the judgment is a corrected judgment - which Petitioner never requested - and not a new trial. *See Vaughter v. Eastern Air Lines, Inc.*, 817 F.2d 685, 689 (11th Cir. 1987) ("[T]he failure of the trial court to designate in the judgment the class thereby bound may be deemed an oversight or omission subject to

correction pursuant to Rule 60(a)"); *Harmsen v. Smith*, 693 F.2d 932, 942 (9th Cir. 1982) (failing to describe class members is a "deficiency in the judgment [that] has not prejudiced defendants and can easily and appropriately be corrected"); *Young v. Katz*, 447 F.2d 431, 435 (5th Cir. 1971) (remanding to district court to specify the class in the judgment). Here, the trial court identified the members of the class in its order granting certification and those class members received individual notice and the opportunity to opt-out. Because the record clearly describes the class members bound by the judgment, any defect in the form of the judgment is a mere technical error, is not prejudicial, and does not suggest that the specific content of the unopposed class notice warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 1:02 CV0844

[Filed May 20, 2004]

IN RE: SCRAP METAL ANTITRUST LITIGATION	)

JUDGE KATHLEEN M. O'MALLEY

ORDER PRELIMINARILY APPROVING PROPOSED SETTLEMENTS WITH BMI AND WEINGOLD DEFENDANTS, CLARIFYING THE CLASS DEFINITION, AUTHORIZING NOTICE TO THE CLASS, AND SETTING A HEARING DATE

Upon consideration of Class Plaintiffs' Motion for Preliminary Approval of Proposed Settlement with Bay Metal Inc. ("BMI"), Class Plaintiffs' Motion for Preliminary Approval of Proposed Settlement with Defendants M. Weingold & Co., Harry Rock & Associates, Inc., and Jack Weingold (collectively, the "Weingold Defendants"), Clarification of the Class Definition, Approval of the Form and Manner of Notice to the Class and Approval of the Proposed Settlement Schedule, the attachments thereto and the

submissions of the parties, it is hereby ORDERED as follows:

1. The Class in this action shall be defined as:

> All persons or entities who sold ferrous or nonferrous industrial scrap metal in Northeast Ohio and the surrounding counties, which is comprised of Ashtabula, Cuyahoga, Lake, Lorain, Medina, Stark and Summit counties, to Defendants between December 1992 and March 2000. Excluded from the Class are Defendants, and their respective parents, subsidiaries and affiliates, as well as any governmental entities. Also excluded from the Class is any party, whether named or not, who is ultimately deemed to have participated in an illegal conspiracy.

2. Upon review of the record, the Court finds that the proposed settlement between Class Plaintiffs and Defendant BMI, which was arrived at by arm's-length negotiations by experienced counsel, falls within the range of possible approval, and is hereby preliminarily approved.

3. Upon review of the record, the Court finds that the proposed settlement between Class Plaintiffs and the Weingold Defendants, which was arrived at by arm's-length negotiations by experienced counsel, falls within the range of possible approval, and is hereby preliminarily approved.

4. Both forms of notice, the *Summary Notice of Class Determination and Proposed Partial Settlements*

and Hearing Regarding Settlements ("Summary Notice"), and Notice of Class Determination and Proposed Partial Settlements and Hearing Regarding Settlements ("Mailed Notice"), are likewise APPROVED for dissemination to the Class. Lead Counsel for the Class shall:

a. By no later than 20 days from the date of this Order, cause the Mailed Notice to be mailed by first-class mail to all class members whose names and addresses are known; and

b. By no later than 10 days from the date of the Mailed Notice, cause the Summary Notice to be published once in the *Cleveland Plain Dealer*, the *News-Herald*, the *Chronicle-Telegram*, the *Repository*, and the *Akron Beacon Journal*.

Such notice constitutes the best notice practicable and satisfies the requirements of due process and Federal Rule of Civil Procedure 23.

5. Lead Counsel shall also ensure that copies of the Mailed Notice and the Settlement Agreements are available to class members in a conspicuous place on their internet website.

6. Lead Counsel may retain an administrator to assist in providing notice to the Class, receiving requests for exclusion, and communicating with Class members.

7. A hearing shall be held before the undersigned Judge on, Aug. 19, 2004 at 12:30 p.m. (the "Fairness Hearing"), for the purpose of considering whether to approve the proposed settlements between the class

and BMI and the Weingold Defendants respectively as fair, reasonable, adequate, and in the best interests of the class. The hearing may be rescheduled or continued; in this event, the Court will furnish all counsel with appropriate notice. Lead Counsel shall be responsible for communicating any such notice promptly to the class by posting a conspicuous notice on their internet website: www.bsfllp.com.

8. Class members who wish to object or otherwise be heard with respect to the proposed settlements, or to appear in person at the Fairness Hearing must first send a *Notice of Intention to Appear* and a *Summary Statement* outlining the position(s) to be asserted and the grounds therefor, together with copies of any supporting papers or briefs, via first-class mail, postage prepaid, to the Office of the Clerk of this Court, with copies to Lead counsel for the class, which must be filed with the Clerk of the court no later than seven (7) days prior to the Fairness Hearing. Except as herein provided, no person shall be entitled to contest the terms of the proposed settlement. All persons who fail to file a *Notice of Intent to Appear* as well as a *Summary Statement* as provided above may be deemed to have waived such objections and will not be heard in person at the hearing.

9. Class members who wish to be excluded from the class must send a written request for exclusion from the class, signed by the class member or its authorized designee, by first-class mail, postage prepaid, postmarked no later than Aug. 10, 2004, addressed to the claims administrator appointed by Class Counsel in this action.

DONE and ORDERED in Cleveland, Ohio, this 20th day of May, 2004.

/s/
HON. KATHLEEN M. O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV0844

[Dated January 24, 2006]

IN RE: SCRAP METAL	)
ANTITRUST LITIGATION	)
	)

Cleveland, Ohio
Tuesday, January 24, 2006 9:50 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KATHLEEN
MCDONALD O'MALLEY UNITED STATES
DISTRICT JUDGE
JURY TRIAL VOLUME 1

APPEARANCES:

For the Class Plaintiffs:
William A. Isaacson, Esq.
Tanya S. Chutkan, Esq.
Boies, Schiller & Flexner

Edmund W. Searby, Esq.
Scott & Scott

For the Columbia Defendants:
Leslie W. Jacobs, Esq.
Charles L. Freed, Esq.
Horatio G. Mihet, Esq.
Thompson Hine LLP

For the Defendant DeMilta:
William D. Beyer, Esq.
Joan E. Pettinelli, Esq.
Wuliger, Fadel & Beyer

Court Reporter:
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United States District Courthouse
801 West Superior Avenue
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

[p.2] MORNING SESSION, TUESCAY, JANUARY 24, 2006, 9:50 A.M.

(Proceedings had out of the presence of the Jury:)

THE COURT: Good morning.

MR. ISAACSON: Good morning.

THE COURT: All right. I want to address a couple of issues quickly before we bring the jury out. I don't want to keep them waiting, so I'm not going to have any more argument or discussion on the issues. I'm just going to tell you where I stand.

As it relates, first, to the question of exhibits, I have not had the ability to make a final determination with respect to all of the objections to all of the exhibits, partially because I was involved in another trial all last week and partially because you all continued to dump on me a number of issues to address over the course of the weekend, and last night, and I've attempted to address all those issues first.

I will tell you the extent to which I have resolved certain questions as it relates to exhibits. The rest, I think, are all amenable to resolution as we proceed to the extent that they raise hearsay or other objections or relate to the issue of whether a proper foundation can be laid.

We have a couple outstanding motions. The [p.3] first is the motion for leave to admit additional counsel on behalf of the plaintiffs pro hac vice. That motion is granted.

The next is the defendants' joint motion to decertify the class for trial, and the parties have briefed that issue fully. Rarely in complex cases do I say that motions pose questions for easy resolution, but this is probably the second or third time I've said this in this case. Given the timing of this and the obviously improper timing of this, it's an easy call for the Court to conclude that the motion must be denied.

The Court certified the class in this case without any opposition to class certification. The first notice was sent out without any opposition or discussion regarding the propriety of the notice. The time for appeal as to the certification of the class passed, or at least the initial appeal, the time for filing of dispositive

motions passed, and no issue was ever raised with respect to the question of the propriety of the class certification or the sufficiency of the notice provided.

The defendants claim that it was because of the Bluestar settlement that made them quote-unquote "think about the issue." Well, the defendants had an obligation to think about the issue long before that. And the mere fact that they have now thought about the issue and have some [p.4] concerns that should have been expressed and could have been expressed for not just months, but years, and for which there were numerous vehicles to express them, including the dispositive motions, can't excuse their motion on the eve of trial to completely and dramatically change the scope of this litigation. So the motion is denied.

The next two issues go together, and they relate to the late identification of exhibits. I have a series of letters that I will make of record in this case because I think this issue is so important. The plaintiffs raised this issue with the Court, and the defendants have responded by letter, and I have spent a substantial amount of time analyzing this question.

Mr. Bahm was identified as a witness on the plaintiffs' exhibit list. Thereafter, the plaintiffs, having contacted Mr. Bahm to confirm final preparations for his testimony, learned that Mr. Rahm's health had deteriorated dramatically and that he was unable to travel to Cleveland for the trial. They then asked to take a trial deposition of Mr. Bahm. The defendants objected to that on grounds that it should have been done during the discovery period. I overruled that objection and found that it was appropriate to go forward with the deposition of Mr. Hahm because it

was simply a trial deposition for purposes of preserving the testimony of a witness who might become

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 1:02 cv 0844

[Filed September 30, 2006]

IN RE: SCRAP METAL ANTITRUST LITIGATION)

JUDGE KATHLEEN M. O'MALLEY

ORDER

This matter arises on two post-trial motions filed by Defendant Columbia Iron and Metal Company ("Columbia"). Class Plaintiffs ("Plaintiffs") oppose the motions, which have been extensively briefed and are now ripe for resolution. The pending motions are:

1. *Columbia Iron and Metal Company's Renewed Motion for Judgment as a Matter of Law* ("Motion for Judgment") (Doc. 645); and

2. *Columbia Iron and Metal Company's Motion for New Trial or Amendment of Judgment* ("Motion for New Trial") (Doc. 646).

For the reasons outlined below, Columbia is not entitled to: (1) judgment as a matter of law; (2) a new trial; or (3) amendment of the judgment. Accordingly, Columbia's motions are **DENIED**. The jury's verdict (Doc. 636) and the Court's judgment (Doc. 640) stand.

I. BACKGROUND

By way of introduction, the Court briefly summarizes below the events and allegations that led to the trial in this case. The following is only a summary, however. The evidence presented and legal determinations made during the trial, which give rise to the present motions, are presented as necessary in the discussion section of this Order.

Manufacturing processes for products with metal components generate both ferrous and nonferrous industrial scrap metal. This scrap metal can be resold to mills and foundries, which recycle the scrap into the manufacture of new metal products. The Defendants[1] operate businesses that buy residual scrap from industrial and other customers and resell it in Ohio and other states. Generally, Defendants submit bids to customers, in which they offer to purchase scrap generated during a given period of time, at a specified variance from the pricing for scrap set forth in various publications, such as *Iron Age* magazine. For this

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[1] Ultimately, due to settlements with most of the originally named Defendants and dismissals of certain others for various reasons, only three of the many original Defendants went to trial in this case, two of whom are related entities. Though Columbia was the only Defendant the jury found to be liable, for ease of reading only, the Court generally refers to "Defendants" as a whole throughout this section of its Order.

reason, the customers (*i.e.*, the Plaintiffs) are often referred to as scrap "generators." If a bid is accepted, a contract is entered into at the bid price, for the bid period. Defendants then leave collection boxes with their customers, where the scrap is deposited for pick-up. Once retrieved from the collection boxes, the Defendants weigh the scrap they have collected, pay the generator per the contract, and then, for example, resell it to mills or foundries.

In this case, Plaintiffs alleged that, beginning no later than December 1992, Defendants conspired to restrain trade, suppress and eliminate competition and fix the price of scrap in Northeastern Ohio. Plaintiffs asserted that Defendants furthered this conspiracy through a variety of unlawful and improper acts, including the following:

(1) Participation in meetings and conversations to allocate customers and rig bids for the purchase of scrap metal;

(2) Participation in meetings and conversations to set pricing for the purchase of scrap and exchange of documents establishing the agreed-to pricing for certain accounts;

(3) Engaging in "quid pro quo" arrangements to compensate the pre-arranged losing bidder or companies that agreed to refrain from bidding, *i.e.*, by agreeing to sell the losing bidder specified volumes of scrap at favorable pricing;

(4) Submitting rigged and collusive bids to Plaintiffs and class members;

(5) Intimidating other scrap dealers not to offer competitive bids;

(6) Maintaining the illegal conspiracy by directing Defendants' own employees not to compete for certain customers;

(7) Imposing financial penalties on co-conspirators that disobeyed customer allocation agreements and other rules of the conspiracy; and

(8) Concealing the conspiracy by holding meetings in secret and withholding information from government investigations.

In support of their allegations that Defendants' conduct amounted to anti-competitive activity, Plaintiffs pointed to a variety of specific incidents, each of which was presented to the jury by way of documentary evidence and testimony from various employees of the Defendant-companies. For example, Plaintiffs provided evidence that:

(1) In or about 1993, Atlas Lederer Company, Inc. ("Atlas Lederer")[2] employees were directed not to compete for a certain account because the account "belonged" to another scrap dealer; and

(2) In or about 1995, a major stamping company and longtime Weingold customer put its

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[2] For most of the conspiracy period, Atlas Lederer was a subsidiary of Columbia.

> scrap out to bid. At that time, Atlas Lederer had a pending bid for the scrap. At Columbia National Group, Inc.'s direction, Atlas Lederer retracted its bid, allowing Weingold to retain the contract. In exchange for Atlas Lederer's retraction, Weingold then sold volumes of scrap to Columbia Trading, Inc.[3]

Plaintiffs also asserted that the Defendants and other co-conspirators directed salespersons not to bid on certain accounts, placed phone calls to employees of other co-conspirators complaining that they were driving up the prices of scrap and threatened non-conspirators with retaliation for bidding on the accounts of conspirators. According to Plaintiffs, the clear intent of these actions was to depress pricing to non-competitive levels by removing the "competitive" component of the scrap metal business from the market. Plaintiffs contended that, as a result of Defendants' unlawful conduct, Defendants intended to, and did, reduce and restrain price competition in the purchase of scrap metal, with the result that prices paid to Plaintiffs essentially were fixed, restrained or maintained at artificially low levels during the conspiracy period.

In addition, Plaintiffs alleged that Defendants fraudulently concealed their unlawful conspiracy from Plaintiffs until at least March of 2000. At that time, Plaintiffs learned that Defendant Bay Metals, Inc.

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[3] Weingold and Columbia National Group, Inc. ("Columbia National") also were Defendants in this case. Weingold settled with the Plaintiffs and Columbia National was found not to be liable by the jury.

("Bay Metals") had agreed to plead guilty to a conspiracy with unnamed co-conspirators to rig bids and to allocate supplies of ferrous and nonferrous scrap from 1992 through 1999, all in violation of 15 U.S.C. § 1. Plaintiffs asserted that they did not discover this secret activity until it was disclosed to the public by government attorneys with the filing of a criminal complaint. According to Plaintiffs, Defendants fraudulently concealed their conspiracy through:

(1) Secret meetings and telephone calls in which the prices, bids and markets for scrap were discussed and agreed to;

(2) Allocating secretly among themselves sellers of scrap (including, among others, Plaintiffs) and/or contracts for the purchase of scrap;

(3) Creating a false and misleading appearance of competition for Plaintiffs;

(4) Instructing members of the conspiracy not to divulge the existence of the conspiracy to others who were not in the conspiracy;

(5) Limiting the anti-competitive, unlawful plan to a small number of people and key officials at each Defendant company and misrepresenting the reasons for unlawful conduct to their own employees;

(6) Avoiding references in documents regarding conduct which would constitute an antitrust violation or anti-competitive act, destroying documentary proof and/or creating code

words and code names in records to disguise the activities of the conspiracy.

(7) Participating in secret meetings and conversations to monitor and enforce adherence to the agreed-upon prices, bids and market shares; and

(8) Falsely representing to sellers that prices were fair and competitive.

After years of litigation, including certain delays occasioned by deference to the on-going criminal proceedings, all but three of the Defendants in this case were either dismissed by or settled with Plaintiffs. The three Defendants that refused to settle are Columbia National Group, Inc., Columbia Trading and Metal Company and DeMilta Iron and Metal.[4] Following the Court's denial of those Defendants' *Daubert* and summary judgment motions, they proceeded to trial. Trial commended on January 24, 2006 and continued until February 7, 2006, at which time the jury received the case and began its deliberations.

On February 9, 2006, the jury returned a split verdict, finding only one of the three trial Defendants liable. As to Defendants Columbia National Group, Inc. and DeMilta Iron and Metal, the jury found no

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[4] As is evident from their name, the two "Columbia" Defendants are related business entities. In sum, Columbia National Group, Inc. is the parent holding company for Columbia Iron and Metal Company (also called "Columbia Trading"). These two Defendants were jointly represented by the same counsel throughout this case.

liability. As to Defendant Columbia Iron and Metal Company, however, the jury found in favor of Plaintiffs and awarded them $11,500,000.00 in damages. The Court then entered judgment in favor of the Plaintiffs and against Columbia Trading and Metal Company in the amount of $23,036,000.00.[5] The instant motions followed.

II. DISCUSSION

Columbia moves for judgment as a matter of law and, alternatively, for a new trial or a reduction of the $23,036,000.00 judgment. In support of these motions, Columbia presents a multitude of "arguments,"[6] each of which relate to Columbia's overarching theme that the Plaintiffs have failed sufficiently to prove their right to receive damages and their assertion that Columbia received an unfair trial.[7] Given the nature of

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[5] Pursuant to 15 U.S.C. § 15(a), the Court tripled the jury's award to $34,500,000.00. The Court then offset that amount by the monies received from the other Defendants' settlements, which totaled $11,464,000.00. No party disputes the amount of the judgment in this regard. Columbia only challenges the underlying verdict amount as being unduly excessive.

[6] As will become evident, one of the principle weaknesses of Columbia's motions is that they contain little to no actual argument on many of the issues presented. Nevertheless, the Court often refers herein to Columbia's bases for its motions as "arguments."

[7] Columbia has not renewed its Rule 50(b) motion on grounds that Plaintiffs submitted insufficient evidence of the existence of a conspiracy. Presumably because, as the Court noted when it ruled on Columbia's initial Rule 50(b) motion at trial, there was substantial evidence of the fact of a conspiracy, Columbia has wisely narrowed its "sufficiency of the evidence" claims and

these arguments, the Court is compelled initially to make certain observations, the effect of which drastically narrows the Court's substantive analysis of Columbia's motions.

First, Columbia essentially complains in its motion for a new trial that the Court caused the verdict against it by subjecting Columbia to an unfair trial. These complaints, which are general in nature and not geared toward identifying any harm specific to Columbia, are indeed ironic given that Columbia's two co-Defendants, subjected to the same trial experience, were found not to be liable. This is particularly true given that Columbia's relationship to Columbia National is that of parent-child (in the corporate sense). It is not as though the Columbia Defendants were completely independent entities, some of whom were deemed liable and others who were not, which is common in multi-defendant cases. Here, half of the related Columbia entities clearly benefitted from the manner in which the trial was conducted. While this observation amounts only to "irony," given that Columbia contends that the trial as a whole was patently unfair (further addressed below), its complaint really boils down to the fact that it lost at trial, and that it does not believe that it should have. Indeed, given Columbia's conduct throughout the trial – including conduct tantamount to suborning perjury by a key witness – and the Court's exercise of significant restraint in connection with that misconduct so as to afford Columbia, out of an abundance of caution, the fairest trial possible,

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focuses primarily (though not exclusively) on the strength (or weakness) of Plaintiffs' proof of damages.

Columbia's claim now that the trial was "unfair" is, to be put mildly, surprising.[8] This conclusion is emphasized by the petty nature of most of Columbia's "arguments," and the invective to which it resorts to try to support those arguments.

Next, Plaintiffs' criticism that Columbia's motions largely are nothing more than a list of unsubstantiated complaints is quite accurate.[9] Indeed, based on its own numbering, Columbia asserts over 20 reasons why it believes it is entitled to judgment in its favor and/or receipt of a new trial – *i.e.*, 5 arguments for judgment in its favor, 19 arguments for a new trial and 1

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[8] Columbia's motion lends the impression that the only rulings this Court made were rulings unfavorable to it and its co-Defendants. That is far from an accurate picture of the trial proceedings. A review of the transcript reveals many instances in which rulings vigorously sought by the Plaintiffs were not made and those vigorously opposed by Plaintiffs were made. In other words, Columbia prevailed in its requests for evidentiary and other (including jury instruction) rulings at many critical points during the trial. While Columbia's current motion ignores that fact, it is, at bottom-line, a fact.

[9] Columbia's motions simply list a series of unsupported criticisms – akin to "assignments of error" in an appellate brief. In response to the Plaintiffs' criticism that argument is lacking, Columbia states that it has already "vetted" the issues with the Court and outlined the nature of its objections on the record – thereby implying that additional explanation is unnecessary.

For the same reasons Columbia refused to provide argument in its motion as to many issues, however, the Court need not revisit each of its reasoned determinations in relation to those objections. The record clearly reflects the Court's analysis and conclusions on those many issues.

argument for reducing the judgment.[10] As to a majority of these reasons, however, Columbia provides no substantive argument or support. Nevertheless, the Court thoroughly has reviewed each of Columbia's arguments, as well as the complete trial record and the Court's many prior written and oral orders. Despite the Court's desire to address each and every fruitless complaint Columbia continues to assert, however, not all of Columbia's arguments warrant substantive consideration. As such, and in the interest of conserving judicial resources, the Court exercises significant restraint in its selection of those issues worthy of attention beyond that which the Court has already provided prior to or during the trial. In this regard, it is noteworthy that the bulk of Columbia's motions present nothing new, they simply reiterate (usually without argument) previously asserted complaints made at trial.

Given these general observations, and for reasons that follow, the Court refuses substantively to reconsider the following numbered arguments in support of Columbia's request for a new trial: 4, 5, 10, 11, 15, 16, 17, 18 and 19. *See* Doc. 646. On these issues, the Court stands on the trial record, which adequately outlines the Court's rulings and requires no supplementation.[11]

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[10] Admittedly, some of these arguments are duplicated in Columbia's motion for judgment as a matter of law and a new trial. Nevertheless, Columbia reasserts them in each motion.

[11] In addition to providing little or no argument on these issues in its motion, Columbia likewise fails to provide argument on these issues in its Reply Brief, despite the Plaintiffs' methodical and

While some of the issues presented certainly are worthy of post-trial discussion, the majority of Columbia's arguments – specifically those in its motion for a new trial – are dedicated essentially to complaining about virtually every ruling the Court made against Columbia both before and during the trial. These rulings involve everything from the Court's articulated resolution of admissibility and jury instruction / verdict form issues – which the Court discussed at length with the parties on the record and, in some cases, later outlined in written orders – to granting deadline extensions to Plaintiffs in connection with various briefs and their responses to Columbia's trial exhibit objections. It is simply beyond comprehension that Columbia asserts "deadline extensions" as three independent grounds for entitlement to a new trial, including a one-day "extension" to allow a filing on the day after a federal holiday, rather than the holiday itself.[12]

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cogent response to each of the issues Columbia chose to assert nakedly in its motion.

[12] The Court, as is its policy when appropriate, has liberally accommodated all parties with extensions of time and leave to exceed page limitations. Indeed, throughout these proceedings the Court accommodated numerous procedural requests from Columbia and its co-Defendants to extend deadlines and page limitations, and even to excuse violations of court orders. When the Court did limit its accommodation, moreover, Columbia saw fit to ignore or "get around" those limitations in any event. For example, despite the Court's *partial* refusal to grant Columbia leave to exceed the page limitation for its Reply Brief (5/12/06 non-document order) – *i.e.*, the Court granted leave for an additional 10 pages only – Columbia seemingly manipulated its brief's length by altering the font size throughout the brief, as evidenced by the small typeface that is inconsistent throughout.

Though certainly not as offensive as the proposition that a deadline extension warrants a new trial, but still warranting no substantive response, are Columbia's various arguments relating to jury instructions, the verdict form and other random issues of admissibility.[13] For example, Columbia summarily asserts – without new argument or legal support – that the Court erred by not including all

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No doubt such a maneuver would have drawn criticism by Columbia – perhaps to the point of arguing that a new trial is warranted – had Plaintiffs engaged in similar gamesmanship.

[13] Columbia revisits several admissibility issues. For example, it nakedly asserts that it is entitled to a new trial based on the Court's: (1) allowance of Howard Bahm's trial deposition on the eve of trial; (2) admission of alleged co-conspirator statements; and (3) disallowance of Donald Messinger's testimony. *See* Doc. 646, Nos. 10, 11 and 15. These issues, however, squarely were addressed by the Court during various pre-trial conferences, on the record, and in several written orders. *See* Docs. 530, 561 and 580. Columbia's post-trial complaints on these issues are no different from its pre-trial and in-trial complaints; therefore, the Court's prior analyses apply with equal force and need not be repeated simply because Columbia has chosen summarily to reassert its prior arguments without even attempting to articulate the nature and/or scope of the arguable prejudice it believes to have flowed from the Court's determinations. Obviously, such articulations are necessary to a finding that a new trial is warranted and are likely necessary to preservation of a new-trial request on those grounds.

of Columbia's proposed jury instructions[14] and verdict form questions. In so far as Columbia's arguments on these issues have not materially changed, and the evidence presented at trial does not materially impact the Court's prior analysis of them (except possibly to make its original conclusions stronger), the Court need not re-articulate its determinations on these issues. For the same reasons the Court refused to reconsider arguments again and again at the January 16, 2006 Final Pre-Trial Conference, the Court, though tempted, likewise refuses to revisit these issues

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[14] Though Columbia *selectively* addresses several specific issues relating to various jury instructions and the verdict form (Doc. 658 at 29-36), in its Reply Brief, Columbia did so only in response to Plaintiffs' criticism of its summary argument that all of its proposed instructions and verdict questions should have been adopted. In this regard, Columbia admits that its specific attention to the few issues on which it chose to elaborate is merely to appease the Plaintiffs' concerns – *i.e.*, it is not to provide new argument. Indeed, Columbia claims that "the grounds for its objections were fully vetted with the Court." Doc. 658 at 29 (emphasis added). Likewise, the Court's responses to Columbia's original objections on these (and all) issues relating to the jury instructions and the verdict form were fully explained on the record during the charge conference and need not be reiterated here. The Court stands on the record with regard to these issues and, therefore, need not substantively respond to Columbia's selective and belated arguments.

again.[15] The Court stands by its prior rulings on these issues.

For these reasons, this Order substantively addresses only some of Columbia's many arguments for judgment as a matter of law and for a new trial. In sum, the Court addresses the following:

- Arguments 1, 2, 3, 4, and 5 in Columbia's motion for judgment as a matter of law (Doc. 645); and

- Arguments 1, 2, 3, 6, 7, 8, 9, 12, 13, and 14 in Columbia's motion for a new trial (Doc. 646. (Note: Arguments 1, 2, 3, 8, 9 and 13 simply mirror the arguments in Columbia's motion for judgment as a matter of law and do not warrant separate attention. Argument 12 is addressed briefly below only; beyond the comments below, it warrants no additional consideration. Accordingly, as to the motion for a new trial,

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[15] At the January 16, 2006 Final Pre-Trial Conference, in response to Columbia's counsel's insistence to argue and re-argue points that had been discussed at length by the parties and the Court in that and prior proceedings (under the guise of "preserving the record"), the Court commented:

> *I'm going to rule on a number of these issues. You have briefed them to death. If you don't like my rulings at this point, you can take them up with the Court of Appeals. I don't want every time to sit up here and hear "just for the record, I'm going to tell you how wrong you are again, Judge." So, I'm going to rule on these motions and then we'll move forward.*

January 16, 2006 Tr. at 39-40.

only arguments 6, 7 and 14 warrant individual attention).

A. The David Miller Outline (*i.e.*, the Miller Script)

Before turning to its analysis of those issues worthy of substantive attention, the Court addresses Columbia's charge that the Court inappropriately breached the attorney-client privilege by disclosing to Plaintiffs' counsel an outline that David Miller, Columbia's chief executive officer, used to "prepare" for his trial testimony and which he had at the trial table with him throughout the trial days leading up to his testimony. Though for different reasons than Columbia presents, this issue warrants discussion. Rather than grounds for a new trial, the events surrounding the discovery and disclosure of the "Miller outline" demonstrate (1) gross misconduct by Columbia and its counsel, and (2) the Court's efforts, despite that misconduct, to provide Columbia (and all parties) a fair trial in any event.[16] They certainly do not support the view that a new trial is warranted. In so far as

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[16] Indeed, though Columbia touts the Court's disclosure as a breach of the attorney-client privilege, it provides no argument or legal support for the proposition that the disclosure – assuming the material was privileged – justifies a new trial under Rule 59. In so far as Columbia fails to support its assertion, the Court need not engage in independent research and analysis of that issue. In any event, given the circumstances here, Columbia has no basis to argue any wrongdoing by the Court or Plaintiffs' counsel. The Court limits its discussion here, therefore, to clarifying the record, rather than analyzing whether prejudice flowed from the disclosure. If anyone or anything was prejudiced by these events, it was the Plaintiffs and the integrity of the trial process, not Columbia.

Columbia's attack on the Court's resolution of this issue is so fundamentally flawed, the Court is compelled to respond.

David Miller was examined in three contexts during the trial. On January 26, 2006, he was called "as on cross" during the Plaintiffs' case. At best, as is readily discernable from the trial transcript and the Plaintiffs' accurate and unopposed description of the same in their Opposition Brief (Doc. 655), Miller repeatedly – and admittedly – testified inconsistently with his prior deposition testimony. On numerous occasions, Plaintiffs' counsel directed Miller to prior deposition testimony that was directly at odds with his trial testimony. In response to these blatant inconsistencies, among other things, Miller explained that he had trouble remembering various past events due to the passage of time. Though the Court's function in connection with the present motions is not to weigh Miller's credibility, in connection with this discrete issue, it is a fair and objective observation that Miller's testimony was, at best, consistently inconsistent.

On February 1, 2006, Miller testified again, this time in Columbia's case in chief. In an obvious (and understandable) effort to rehabilitate Miller's credibility and clarify his prior trial testimony, Columbia's counsel revisited many of the topics on which Miller had testified. Miraculously, Miller's recollection improved. Without any qualifications that his memory had been refreshed by material outside of his own recollections, and without any in-court efforts by Columbia's counsel to refresh his recollection with specific documents or other evidentiary materials, Miller testified that his prior recollections on a variety

of the topics covered by Plaintiffs' counsel were incorrect. He then went on to provide articulate and detailed recollections on the very topics he struggled to recall only days before. He swore under oath that he then had a current and very specific recollection of virtually every event, discussion, or transaction relevant to Plaintiffs' claims.

On February 2, 2006, Plaintiffs' counsel had a second opportunity to cross-examine Miller, this time as Columbia's witness. Among other things, counsel questioned Miller's ability suddenly to recall things (or to recall things differently) on direct examination which, only days before, he could not remember. In the course of that inquiry, the following exchanged occurred:

Plaintiffs' counsel: Last week you didn't recall anything about this, did you?

Miller: If that's what I said, that's what I said.

Plaintiffs' counsel: And who helped you remember this stuff?

Miller: I went through the whole scenario from start to finish. I went through the testimony, and the lawyers helped me with an outline.

Plaintiffs' counsel: Did the lawyers give you a written outline that helped you remember things?

Miller: No, they did not give me a written outline.

Plaintiffs' counsel: What's the outline you just referred to?

Miller: An outline to show me, you know, '95, '91, '99, '88, helping me to put the thing together.

Plaintiffs' counsel: Was that a written outline?

Miller: It was a written outline, yes.

Plaintiffs' counsel: And you used this written outline to prepare for your testimony?

Miller: Yes.

Plaintiffs' counsel: Okay. And it was prepared by someone other than you?

Miller: No, it was prepared for me – by me – it was written by somebody else and with me, yes.

Plaintiffs' counsel: And where is this outline, sir?

Miller: Sitting on that table.

Tr. at 1351 (emphasis added).[17]

At that point, all counsel assembled at sidebar and Plaintiffs' counsel asked to see the "outline" to which Miller referred.[18] Columbia's counsel objected, arguing that the document is a privileged communication between he and his client and that it was prepared with Miller,[19] not so as to form the basis for his testimony, but only to serve as an "aid" in preparation for his trial testimony.[20] In this regard, Columbia argued that the outline, and counsel's discussions with

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[17] Unless otherwise identified as such, all references herein to "Tr." relate to the trial transcript.

[18] The "Miller Direct Examination Outline" was submitted "Under Seal" only in so far as it was not to be presented to the jury. It is, however, part of the record in this case. For ease of reference, it is attached as an exhibit to this Order.

[19] Columbia's counsel summarized the creation of the outline essentially as a running compilation – *i.e.*, recording – of facts that Miller had "remembered" over a two-year period. *See* Tr. at 1374-75. In this regard, counsel argued that the content of the outline originated with Miller's "historical recollection" and, therefore, was not problematic. Of course, this explanation – even if true – does not justify counsel's knowing decision to place Miller on the stand to say that he remembered at the moment of his testimony that which was in the outline. As evidenced by his inability to remember many of the same facts on cross-examination during Plaintiffs' case, clearly Miller did not have present recollections, as he and his counsel led the jury and the Court to believe. Under this explanation, the outline was actually an outline of counsel's recollections, not Miller's.

[20] The Court's exchange with counsel at sidebar appears at pages 1353-1358 and 1365-1375 of the trial transcript.

Miller prior to his direct examination, were standard witness preparation materials and activities.

In sum, Plaintiffs' responded that, despite his inability to recall certain information only days before, Miller's testimony on direct examination was that he had present – though now different – recollections of the same information. He did not voluntarily indicate that his revised memories derived from reviewing external materials or by being "refreshed" by discussions with his lawyers. On cross, however, he confessed that, because he has problems recalling things, he and his lawyers had gone "through the whole scenario from start to finish . . . and the lawyers helped [him] with an outline." Plaintiffs argued, therefore, that Miller's testimony as presented on direct was incredibly – and intentionally – misleading because it led the jury and the Court to believe that he had present recollections of the topics covered, when clearly he did not. It did not, moreover, allow the jury to assess the strength of his current recollections by providing a fair and honest account of how they came about – *i.e.*, by knowing what "refreshed" his memory. Rather, Miller's "recollections" amounted to nothing more than "recitations" of the materials his lawyers had assembled into a 7-page outline, argued the Plaintiffs.

As outlined by the Court during its sidebar conference with counsel, the problem with the "outline" is that it is not truly an "outline" at all – it is not a general outline of topics to be covered during an examination, where the witness will be asked to provide present recollections or knowledge, if any, on those topics. Rather, it is an organized outline of

specific facts; it was a script.[21] Rather than refreshing Miller's recollection with documents while he was on the stand (*e.g.*, to verify dates or times), Columbia's counsel elected instead to educate Miller about facts which, whether he ever knew them or not, he did not presently recall, and then put him on the stand to testify, without qualification, that he did presently recall all of the topics covered in the outline. While such conduct would be problematic in any case, as noted on the record, it is particularly troubling here because Miller had repeatedly testified that he had trouble remembering things, including most of the very topics covered in the outline. With such a witness, for counsel to create a detailed fact-intensive outline, to provide that outline to Miller to study, and to allow Miller to rely upon that outline as the basis for his testimony, is clearly inappropriate.

There is no doubt that much of Miller's direct testimony was not grounded upon present recollections while on the witness stand, as he stated under oath. Rather, as Miller later admitted, his testimony simply parroted the litany of facts his lawyers had reduced to a written outline. In this regard, Miller's testimony was admittedly false and his counsel's assistance in preparing a script for that testimony, and allowing Miller to use it as he did without any effort to correct him or to explain the source of his new recollections, was tantamount to suborning perjury.

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[21] Throughout the outline, hand-written comments appear discussing or expanding on the facts set forth. Columbia's lead counsel admitted that some of the hand-written comments are his.

As such, and especially given the fact that the Court did not permit the jury to see the outline and limited Plaintiffs' counsel's use of it during the remainder of Miller's cross-examination,[22] Columbia's argument now that disclosure of the outline to the Plaintiffs warrants a new trial cannot be countenanced. As noted, the "outline" prepared for Miller's testimony was nothing more than a script, without which Miller admittedly was lost. Counsel's assistance in preparing the outline for the specific purpose of having Miller testify on direct as though he had present recollection of the issues discussed, likely warranted immediate sanctions. Exercising significant restraint, however, the Court merely permitted disclosure of the document to the Plaintiffs and limited their counsel with regard to its use. Frankly, the Court was at a loss at trial to understand how experienced counsel could not only allow a jury to be so mislead by testimony he elicited at trial, but to act outraged when the subterfuge he engaged in with hisclient was uncovered. The Court is even more at a loss to understand why that same counsel would choose to revisit that issue in this context.

B. Motion for Judgment as a Matter of Law – Rules 50(b)

Columbia presents 5 arguments in support of its view that it is entitled to judgment as a matter of law, all of which relate to the sufficiency of the Plaintiffs' evidence relative to liability, injury and damages. The Court addresses below each of the arguments Columbia asserts in connection with the deficiencies it

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[22] *See* Tr. at 1357.

claims relate to these elements of the Plaintiffs' antitrust claims.

1. Legal Standard for Rule 50(b)

Federal Rule 50(b) governs post-verdict motions for judgment as a matter of law. Pursuant to Rule 50(b), this Court has the power to grant judgment as a matter of law as to any "claim or defense that cannot under the controlling law be maintained." Fed. R. Civ. P. 50(b). The "standard for granting a renewed motion for judgment as a matter of law under Rule 50(b) is precisely the same as the standard for granting the pre-submission motion." Wright & Miller, Federal Practice and Procedure: Civil 2d §2537, p. 347 (footnote omitted).

Rule 50(b) applies essentially the same standard of review to a motion for judgment as a matter of law as to a motion for a directed verdict. *See* Advisory Committee Notes on 1991 Amendment to Fed. R. Civ. P. 50; *Gillentine v. Vanzant*, 1994 U.S. App. LEXIS 35160 at *17 (6th Cir. 1994). Rule 50(b) allows the court to enter judgment as a matter of law "when the facts are sufficiently clear that the law requires a particular result." Wright & Miller, Federal Practice and Procedure: Civil 2d §2521, p. 240. Whether evidence presented at trial "was sufficient to create an issue of fact for the jury or will permit the court to enter judgment as a matter of law is solely a question of law to be determined by the trial court." *Id.* at §2524, p. 249; *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975).

In cases involving federal questions,[23] "the appropriate standard for measuring the sufficiency of the evidence to direct a verdict under Rule 50 . . . is whether there is evidence upon which the jury could properly support a verdict in favor of the party against whom the motion is made." *Patrick v. South Central Bell Tel. Co.*, 641 F.2d 1192, 1197 (6th Cir. 1980)(citation omitted). The ultimate question, then, is whether the jury could properly find for the non-moving party when the correct legal standard is applied. *Markman v. Westview Instruments. Inc.*, 52 F.3d 967, 974 (Fed. Cir. 1995), *aff'd*, 116 S.Ct. 1384 (1996).

The Court is not free to weigh the parties' evidence or to pass upon the credibility of witnesses. *Black v. Zaring Homes*, 104 F.3d 822, 825 (6th Cir. 1997); *K & T Enters. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996). Nor may the Court substitute its own judgment for that of the jury. *Zaring Homes*, 104 F.3d at 825; *K & T Enters.*, 97 F.3d at 175-76. Instead, the Court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the record. *Zaring Homes*, 104 F.3d at 825; *K & T Enters.*, 104 F.3d at 176. When the evidence would permit reasonable minds to differ on the issues decided by the jury, a motion for judgment as a matter of law must be denied. *American and Foreign Ins. Co. v. Bolt*, 1997

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[23] Clearly, this case implicates a federal question – *i.e.*, it arose under the federal antitrust laws. The Court points this out only because the standard of review applicable to a Rule 50(b) motion turns upon whether the case exists in federal court based on a federal question or diversity. *See K&T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171 (6th Cir. 1996).

WL 57361 (6th Cir. 1997). In short, every effort must be made to uphold the verdict if reasonably possible.

2. Discussion of Rule 50(b) Motion

As noted, Columbia presents 5 challenges to the sufficiency of the Plaintiffs' evidence, each of which it argues warrants judgment as a matter of law in its favor. The first two arguments relate to liability. The last three arguments relate to injury and damages. In sum, Columbia argues that the Plaintiffs failed to provide sufficient evidence:

(1) that Columbia was a participant in the conspiracy at all;

(2) that Columbia was a participant in the conspiracy during the relevant statute of limitations period;[24]

(3) that all members of the Plaintiff Class were injured;

(4) that the named Plaintiffs individually were injured; and

(5) that an identifiable amount of damages were incurred by individual Plaintiff class members.

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[24] Columbia identifies these first two items as arguments 1 and 5 in its motion. For ease of reference, and because the Court analyzes these two arguments jointly below, the Court has not maintained Columbia's numbering scheme.

For the same reasons articulated by the Court in response to Columbia's initial Rule 50(b) motion at the close of the Plaintiffs' case, Columbia's sufficiency challenges relating to its participation in the conspiracy – either on the whole or during the relevant statute of limitations – are not well taken and certainly do not support entry of judgment *as a matter of law* in Columbia's favor when the Court, as it must, gives the benefit of all reasonable inferences to the Plaintiffs. Given the standards this Court must employ at this stage of the proceedings, these arguments do not even present a close call. In any event, the Court addresses them briefly below.

Columbia's three remaining challenges, which attack the sufficiency of the evidence presented on the issues of injury and damages, present closer questions. In this regard, the Court noted during its oral ruling on Columbia's initial Rule 50(b) motion that the issues Columbia raised relative to damages present the greatest weakness in the Plaintiffs' case and would, as they had to that point in the trial, merit the closest scrutiny by the Court.

a. The Liability Arguments – Columbia's Participation in the Conspiracy, Both Generally and During the Relevant Statute of Limitations Period

Columbia's view that the evidence cannot support the jury's conclusion that Columbia participated in the conspiracy, as with many of Columbia's other post-trial criticisms, is troubling because it is wholly unsupported by argument or reference to the record. In its motion, Columbia *nakedly* asserts that the

Plaintiffs failed to provide sufficient evidence that Columbia participated in the alleged conspiracy at all, much less within the relevant limitations period. Nowhere, not even its reply, however, does Columbia outline the bases – legal or factual – for those assertions. In response, Plaintiffs' provide an exhaustive – and accurate – summary of the evidence presented at trial relevant to those issues, as well as specific references to portions of the record that support the jury's conclusion that Columbia participated in the alleged conspiracy during the limitations period, as tolled. Columbia's Reply Brief completely ignores the liability issue – which Columbia raised in the first place – and addresses itself almost exclusively to the injury and damages issues.[25] Accordingly, Columbia seemingly has abandoned its argument that the Plaintiffs' evidence on liability was insufficient.

As is the case with many of the other arguments Columbia asserts but does not support, the Court must decide, therefore, whether it should substantively address these issues. Because the Court's oral

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[25] As if to justify its failure to support the very issue it raises, Columbia states in its Reply Brief:

> . . . although [Columbia] believes that each original argument is meritorious, it will not restate every ground contained in its Motions for Judgment as a Matter of Law, for a New Trial or Amendment of Judgment. This brief will focus on the following issues . . .

Doc. 658, "Introduction" section. Columbia then went on to identify various "injury" and "damages" issues, which it discusses at length (though its discussion, as explained *infra*, was unnecessarily complicated).

resolution of these items – which are more "traditional" Rule 50 issues, as opposed to Columbia's laundry list of other complaints – was accurate but not exhaustive,[26] the Court deems them worthy of some consideration here, even if Columbia does not. Given Columbia's acquiescence, however, the Court's efforts are directed primarily toward making a clear record as to the sufficiency of the Plaintiffs' evidence on liability.[27] The Court's discussion of these issues, therefore, will be brief and in large part derives from the Plaintiffs' summary of the evidence presented at trial.

As observed by the Court at the close of the Plaintiffs' case, sufficient evidence on the issue of Columbia's general "participation" in the alleged conspiracy clearly was presented. The Court stated:

> Okay. Well, the presentation of proofs has played out pretty much like the parties' briefs in this case foreshadowed, and that is that there was sufficient evidence of the existence of a conspiracy involving a sufficient number of the large competitors in the industry to have an industry-wide impact, and there was evidence that . . . [Columbia] . . . participated at some

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[26] *See* Tr. at 1129-30.

[27] The brevity with which Columbia has approached its renewed motions suggests that Columbia's concern may only be that of preserving these issues for appeal. Given Columbia's failure to support, or otherwise provide some substantive argument in connection with most of its "arguments," however, it is possible that the issues have been waived in any event.

> point in time or at varying points in time in some aspects of that conspiracy.
>
> The law is pretty clear that not all conspirators have to know of all the other participants, and that even having a small connection to the conspiracy can be enough.
>
> As . . . [Columbia] . . . argued, there are inferences that could be drawn the opposite way, but there is certainly sufficient evidence that would justify going to the jury on the issue of liability as it relates to the existence of a conspiracy and the participation of . . . [Columbia] . . . in a conspiracy.

Tr. at 1130. The Court's conclusion in this regard was based on, among other things, the plethora of testimony from numerous Columbia employees and third parties in the industry. Most significantly, these witnesses (as accurately outlined in Plaintiffs' summary – Doc. 655) testified that "unwritten" agreements existed between Columbia and other scrap dealers not to compete with one another, so much so that various competitors would complain to Columbia's chief executive, David Miller, if Columbia bid on an account that "belonged" to another scrap dealer. Indeed, the evidence from which the jury reasonably could have concluded that Columbia generally participated in the alleged conspiracy is staggering. Columbia's argument that it is insufficient – especially because that argument is unsupported – is frivolous.

As the Court noted during the trial, while the 4-year statute of limitations complicates the sufficiency analysis, it is not fatal to it. For the reasons

outlined in the Court's consideration of the statute of limitations issue *infra*, and as the jury was instructed, the "critical date" for statute of limitations purposes was, at the latest, March of 1996 because – at a minimum – the limitations period was statutorily tolled under 15 U.S.C. § 16(i) as of March of 2000. As outlined by Plaintiffs in their Opposition Brief, sufficient post-March 1996 evidence was presented, from which the jury reasonably could have concluded that Columbia's pre-March 1996 participation continued into the limitations period.[28]

The post-March 1996 evidence notwithstanding, the jury reasonably also could have concluded that additional tolling *via* the doctrine of "fraudulent concealment" was appropriate because: (1) the Plaintiffs were entitled to argue that the conspiracy was self-concealing (like most conspiracies); (2) evidence was presented by the named Plaintiffs that they were unaware of the existence of the conspiracy until news of the government's criminal case against one of the Defendants broke; and (3) substantial evidence was presented from employees of the co-conspirators (including Columbia) that would justify the conclusion that efforts were, in fact, made to conceal the conspiracy. Under such circumstances, the March 1996 "critical date" reasonably could have been moved forward by the jury to capture some or all of the Plaintiffs' pre-March 1996 evidence supportive of the

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[28] *See* Doc. 655 at 24. Because Columbia does not oppose the Plaintiffs' recitation of these post-March 1996 activity, the Court need not engage in a lengthy recitation of the same.

conclusion that Columbia participated in the conspiracy.[29]

Considering the Plaintiffs' post-March 1996 evidence in conjunction with the fact the jury reasonably could have, and may have, concluded that the conspiracy was fraudulently concealed, there by tolling the limitations period further and incorporating evidence of pre-March 1996 activities, the jury clearly had sufficient evidence upon which to base its unequivocal conclusion that Columbia participated in the conspiracy within the applicable statute of limitations period, either as set by the Court in its instructions, or as adjusted by the jury *via* a fraudulent concealment determination. The Court finds, therefore, that the Plaintiffs presented sufficient evidence from which the jury reasonably could conclude that Columbia participated in the alleged conspiracy within the statute of limitations.

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[29] Plaintiffs also argue that the "continuing conspiracy" doctrine absolves them of any obligation to present evidence of Columbia's participation during the limitations period. They argue that, once Columbia joined the conspiracy – which a reasonable jury certainly could conclude from the evidence as a whole – it becomes Columbia's burden to demonstrate withdrawal from the conspiracy. Absent such a showing, Plaintiffs maintain that the jury reasonably may conclude, even without any evidence, that Columbia continued to participate in the conspiracy into the limitations period – whatever it is. Indeed, Columbia specifically requested that a "withdrawal" instruction be given to the jury. In light of the strength of the evidence outlined above, however, the Court need not address this alternative argument.

Accordingly, Columbia is not entitled to judgment as a matter of law on this basis.[30]

b. The Injury and Damages Arguments – Sufficiency of the Evidence as to (1) Individual (*i.e.*, Named Plaintiffs) and Class-Wide Injury, and (2) Calculation of Damages of Individual Class Members.

In connection with its challenges to the sufficiency of the Plaintiffs' evidence on injury and damages, the majority of Columbia's arguments here revisit the very issues addressed in its motion to exclude Dr. Leitzinger's testimony – *i.e.*, its *Daubert* motion,[31] which the Court previously considered at length, despite the brevity of its denial order.[32] In this regard, Columbia severely complicates the relevant issues. The Court has already dedicated a considerable amount of time evaluating Columbia's *Daubert* challenges relative to Dr. Leitzinger and has concluded that, despite the many well-supported attacks levied against the data and assumptions upon which Leitzinger relied, those attacks were best reserved for cross-examination and did not render Leitzinger's

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[30] For the same reasons, though the Court further discusses this issue *infra*, Columbia is not entitled to a new trial on these grounds.

[31] Pursuant to *Daubert v. Merrell Dow Parm., Inc.*, 509 U.S. 579 (1993), Columbia sought to exclude the testimony of Plaintiffs' expert, Dr. Leitzinger.

[32] Columbia's efforts in this regard appropriately are limited to its request for a new trial, and not for judgment as a matter of law.

testimony unreliable, and, therefore, inadmissible under *Daubert*. As evidenced by its verdicts, the jury clearly was critical of Leitzinger's testimony, no doubt in large part due to counsel's vigorous cross-examination.

Given the import of the admissibility issue, the Court briefly addresses Columbia's primary *Daubert*-related concerns. Thereafter, the Court addresses the truly relevant post-trial inquiry, which is whether Leitzinger's testimony provided a sufficient basis from which the jury reasonably could reach the conclusions it clearly did – that Plaintiffs established that individual and class-wide injury occurred and that damages were warranted in light of that injury.[33] Though the Court has struggled – both prior to the trial and now after the trial – with the question of whether judicial intervention is justified in light of certain weaknesses in Leitzinger's analysis, its conclusion remains the same – they are weaknesses for the jury to have assessed, which it did.

1. Columbia's *Daubert* Challenges

While the Court need not engage in an exhaustive *Daubert* analysis, it will address several of the arguments Columbia continues to make in support of the view that Leitzinger's testimony should have been excluded as patently unreliable. Given the nature of Columbia's criticisms, however, the Court deems it

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[33] The Court addresses *infra* the more pointed issue relating to the jury's ability to return an $11.5 million award based on the evidence presented at trial. Columbia argues that the evidence did not support that specific figure and, therefore, the verdict necessarily is flawed. The Court disagrees.

relevant first to remind Columbia that the Court's "gatekeeper" role under *Daubert* is limited; *Daubert* is not to be used to exclude expert evidence simply because it has weaknesses.

In this regard, the Court "need not and should not determine the scientific validity of the conclusions offered by an expert witness. Rather, to decide admissibility the trial judge should only consider the soundness of the general scientific principles or reasoning on which the expert relies and the propriety of the methodology applying those principles to the specific facts of the case." 29 Wright & Gold §6266 at 271-72. Thus, if a court "rules that [a certain] expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. [Rule 702] is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise."[34] *Advisory Committee Notes. See Ruiz-Troche v. Pepsi Cola Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion."). The flexibility of the *Daubert* inquiry "gives the district court the discretion needed to ensure that the courtroom door remains closed to junk science, while admitting reliable expert testimony [– even

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[34] As outlined further *infra*, though the experts in this case did not have directly competing roles – *i.e.*, Columbia's expert was not tasked with performing an independent damages analysis – they did have competing theories as to how best to apply Leitzinger's damages model.

competing expert testimony –] that will assist the trier of fact." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002).

Since the admissibility of expert testimony is an issue to be resolved by the trial judge under Fed. R. Evid. 104(a), the Court "need only find by a preponderance of the evidence that the expert's reasoning and methodology is scientifically valid." 29 Wright & Gold §6266 at 276 (citing *Bourjaily v. United States*, 483 U.S. 171, 175 (1987)). Rule 104(a) serves to underscore that "*Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct." *Ruiz*, 161 F.3d at 85 (emphasis added); *see Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 929 (8th Cir. 2001) ("it is the expert witnesses' methodology, rather than their conclusions, that is the primary concern of Rule 702").

Thus, under *Daubert*, "the rejection of expert testimony is the exception rather than the rule." *Advisory Committee Notes*. This is, in part, because the Supreme Court prefers that litigants rely upon "the capabilities of the jury and of the adversary system generally," rather than "wholesale exclusion" of fairly supported, relevant testimony by the Court. *Daubert*, 509 U.S. at 596. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* This principle remains true even in the most complicated cases. "As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,' it should be tested by the adversary process – competing expert testimony and

active cross-examination – rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." *Ruiz*, 161 F.3d at 85 (quoting *Daubert*, 509 U.S. at 590). The Court's role is "that of gatekeeper[, not] that of armed guard." *Id.* at 86.[35]

With these and the many other *Daubert* considerations in mind, the Court previously evaluated all of Columbia's criticisms of Leitzinger's analysis and concluded that it was admissible because, though weaknesses existed in Leitzinger's application of the model he employed, the model itself was not economically flawed, nor were the weaknesses so patently clear or pervasive as to justify outright exclusion under *Daubert* on the theory that they tainted the otherwise acceptable model. Sufficient room for debate existed as to Columbia's criticisms and Plaintiffs' responses thereto. Yet, Columbia persists in these debates, now to the point of essentially calling Leitzinger an incompetent liar. Given the circumstances of this case, and certainly the nature and severity of Columbia's repeated attacks, the Court is compelled to respond, even if only briefly.

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[35] The Court's above review is not intended to be an exhaustive recitation of the legal standard under *Daubert*; many additional considerations accompany a complete *Daubert* analysis. This review is intended only to emphasize that *Daubert's* purpose is not to be unduly restrictive of expert testimony. Its intent is simply to afford the Court limited control over extreme and unreliable expert testimony. Generally speaking, however, the jury is the most appropriate audience for expert testimony, even if it is complex.

Columbia presents two primary criticisms of Dr. Leitzinger's work. First, it argues that Leitzinger inappropriately used and adjusted processed scrap metal prices identified in the *Scrap Price Bulletin*[36] when calculating his comparative price spreads during and after the conspiracy period. Second, it argues that Leitzinger's decision to "average" the various calculated price spreads – which Columbia further maintains were generated from an unacceptably incomplete[37] data set – was fatal to the accuracy of his analysis. Both at trial and in its *Daubert* motion, Columbia introduced these criticisms through (1) counsel's argument (on brief and on cross-examination) and (2) its expert, Dr. McAnneny, who admittedly limited his efforts to criticizing Leitzinger's damages analysis, but did not conduct an independent analysis of his own. As such, the jury was not presented with competing methods for calculating damages. Rather, the jury was presented with evidence of only one damage calculation method – the experts simply disagree as to certain aspects of that model's application and of the results compelled by appropriate application of it.

A simplified explanation of Leitzinger's analysis is as follows. First, he compiled electronic transaction

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[36] The *Scrap Price Bulletin* is a pricing index published in *Iron Age Magazine*. It, along with other publications such as *American Metal Markets*, is used by scrap dealers (and generators, perhaps) as a pricing guide.

[37] The Plaintiffs do not dispute that the data set employed was incomplete. They only dispute whether that deficiency was (1) able to be cured, and (2) fatal to the accuracy of Leitzinger's analysis in any event.

data recovered from former Defendants Weingold and Rock. This compilation included transaction data from 69 Plaintiff generators. The data served as Leitzinger's representative sample of dealer-generator transactions during and after the conspiracy period. Having divided the data into two categories – *i.e.*, "during" and "after" the conspiracy transactions – Leitzinger analyzed the differences in the margins (*i.e.*, profits) the dealers were enjoying during the conspiracy as compared to after the conspiracy, when the anti-competitive conduct had ended. To do that, Leitzinger observed the price paid to a given generator and compared that figure to an index price (*i.e.*, from the SPB) that generally governed the amount the dealer would recoup *via* its later sale – after processing – to a steel mill or foundry. That analysis identified the dealer's margin, or profit. Leitzinger made the same observations as between the same dealer and generator for transactions that occurred after the conspiracy period. The difference between the "during" and "after" margins, to Leitzinger, manifested the effect of the removal of the conspiracy and restoration of competition to the market – *i.e.*, the margins generally were reduced and generators began getting more money for their scrap after the conspiracy ended. Leitzinger referred to these differences, as "price spreads." He then averaged all of the price spreads to identify what he claimed to be a uniform "undercharge" that had existed during the conspiracy period and negatively – and uniformly – affected the price-per-ton each generator had received for its scrap.[38]

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[38] *See In re Industrial Silicon Antitrust Litigation*, 1998 WL 103157 (W.D. Pa. 1998) (applying a similar methodology).

Scrap Price Bulletin ("SPB")

As noted, the index that Leitzinger used was the SPB, which evidence at trial revealed was commonly used by dealers as a benchmark for processed scrap (ferrous) pricing decisions.[39] The SPB contained pricing information for processed scrap, such that a dealer's pricing negotiations with a mill or foundry often turned upon the price fluctuations identified in the SPB. In December of 1998 and October of 1999, however, *Iron Age Magazine* issued a correction to the SPB, explaining that certain ferrous scrap pricing information had been incorrect. It is these "corrections," and the asserted effect they had on the integrity of Leitzinger's analysis, with which Columbia takes issue.

Based on the undisputed fact that the SPB contained erroneous information in late 1998 and 1999, Columbia argues that it necessarily cannot be a reliable source for Leitzinger's pricing information, which was a critical component of his damages model.[40] While Columbia's expert agrees that a uniform pricing index is necessary to the calculations Leitzinger provided, he disagreed with the use of the SPB.

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[39] Among other evidence on this point, Ron Bone, a Columbia employee, testified that Columbia calculated its bids (for ferrous scrap) based on the SPB. *See* Tr. at 370. Indeed, Columbia's own expert verified that Columbia relied on the SPB for ferrous scrap transactions.

[40] In sum, the SPB adjustments in 1998 and 1999 reflected prices beyond those of normal market fluctuations – so as to correct the prior inaccuracies.

Columbia's concerns about the 1998 and 1999 corrections are mitigated, however, in two respects. First, Leitzinger did not ignore the adjustments made to the SPB's quotes. As he testified at trial, he sought to account for the adjustments – to the extent it was even necessary– by "backing them out" of his analysis, thereby blunting any *arguable* effect they may have had. Second, it is undisputed that the scrap dealers were using the SPB throughout the relevant time periods, in any event, such that any erroneous information it contained would have had little practical impact. On this point, Plaintiffs logically argued both to the Court (*Daubert*) and the jury(trial) that, because the SPB was an accepted – and used – pricing benchmark, any errors it contained at a given time affected everyone equally, ergo, it did not fatally flaw Leitzinger's analysis. In other words, it was not relevant whether the SPB numbers were accurate; what is relevant is that industry participants referred to those numbers, even if wrong, for their pricing decisions.

Setting aside the issues of whether the SPB was the best index to use and whether it contained admitted inaccuracies at various relevant times, Columbia's own expert agreed that, to perform Leitzinger's analysis, an index was required. McAnneny did not testify that he did an independent damages analysis, or that he thought Leitzinger's model is not a viable economic tool for measuring damages under the circumstances of this case. Rather, he only testified as to his disagreement with certain

aspects of how Leitzinger applied his model.[41] Indeed, though he selected a different index – *American Metal Markets* – McAnneny used a pricing index when he employed Leitzinger's economic model to generate his competing "worst case scenario" damages figure of $1.9 million.

In the end, logical economic justifications support *both* Leitzinger's and McAnneny's competing "expert" views, from which a reasonable jury could – and should be permitted to – conclude that either expert's views, or portions thereof, have merit. Under such circumstances, these types of strengths and weaknesses are most appropriately left to the jury for

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[41] As noted previously, another criticism Columbia previously raised, but does not highlight in its briefing on the present motions, was Leitzinger's use of only the Weingold and Rock electronic transaction data. Columbia's view – expressed both through counsel's argument and McAnneny's testimony – was that use of such a limited number of transactions, touching upon only a limited number of generators (69), necessarily tainted Leitzinger's analysis. Leitzinger's justification for using only the electronic data from Weingold and Rock, however, was that (1) it was the only information that was readily available, and (2) to the extent other "paper" information was available, it would have been incredibly difficult, if not impossible, to use. In this regard, the conspirators must at some point bear the burden for various uncertainties. *See Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 265 (1946) ("[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

In any event, though McAnneny criticized Leitzinger's source of information and suggested more "accurate" alternatives (or additions), he did not himself pursue those alternatives or perform an independent analysis to demonstrate the deficiencies he avers exist in Leitzinger's analysis.

resolution, as was done here. Though Columbia has no doubt identified weaknesses in Leitzinger's method, as have the Plaintiffs' in McAnneny's criticisms of that method, they remain just that -- weaknesses, not fundamental econometric flaws. Columbia has not appropriately challenged the theory underlying Leitzinger's method, it has only challenged – successfully in some respects, as evidenced by the verdict – the accuracy of some of his underlying data and assumptions. For this reason, Columbia's arguments relative to the SPB were most appropriately reserved for cross-examination at trial. Its use did not so taint Leitzinger's analysis as to render his testimony unworthy of the jury's consideration.

Averaging Price Spreads

Columbia also challenges Leitzinger's decision to average the varying price spreads in his sample to determine an "average undercharge" experienced by the class during the conspiracy period, which he then applied to the total volume of ferrous scrap sales during the conspiracy to calculate a class-wide damage figure. The underlying basis for Columbia's objection to Leitzinger's averaging rests on Columbia's criticisms – principally through its expert – of Leitzinger's threshold premise that the scrap metal market in Northeastern Ohio was a well-functioning market where the "law of one price" was operating. In a well-functioning market, the experts agree that, if a conspiracy impacts the market, that impact is uniform – *e.g.*, a uniform undercharge. McAnneny called into question, however, Leitzinger's threshold conclusion that the relevant scrap metal market was

well-functioning, and therefore subject to a uniform impact, if an impact existed.

McAnneny's disagreement with Leitzinger's opinion that the market was "well-functioning," however, was not based on an independent analysis of the relevant scrap metal market. Rather, it was based on his limited view that the data Leitzinger used – *i.e.*, the price spreads derived from the Weingold and Rock electronic data – were too diverse. He explained that, if the market had been "well-functioning," one would expect to see more uniformity among the calculated price spreads. In this regard, it is ironic that McAnneny's criticism of Leitzinger's view of the market generally was premised upon the very data McAnneny challenged as being deficient and fundamentally flawed. That fact notwithstanding, McAnneny only testified that the available data undermined Leitzinger's threshold conclusion; he did not testify that, based on an independent analysis of the market (as Leitzinger had done prior to evaluating the price spreads), the market was not well-functioning.

Accordingly, McAnneny's criticism of Leitzinger's view that the relevant market was well-functioning does not amount to competing expert testimony that the market was, in fact, not well-functioning. Leitzinger's opinion on this threshold issue, therefore, is unrebutted. Assuming Leitzinger's unrebutted view that the market operated in a manner that would yield a uniform impact from an anti-competitive conspiracy, therefore, Columbia's challenge to Leitzinger's "averaging" of the price spreads to reveal that uniform impact can only be relevant here – or to the Court's prior *Daubert* considerations – if "averaging" is not a

generally accepted or legally acceptable economic tool for identifying uniform impacts.

That is not the case, however. Recognizing that antitrust cases present damages questions that often are not amenable to concrete mathematical calculations, court have regularly recognized averaging of overcharges as a valid method for determining a uniform undercharge (or overcharge, as the case may be) in well-functioning markets. *See generally, Conwood Company v. United States Tobacco Company, 290 F.3d 768* (6h Cir. 2002); *Paper Systems Incorporated v. Mitsubishi Corp.*, 193 F.R.D. 601 (E.D. Wis. 2000); and *In re Industrial Silicon Antitrust Litigation*, 1998 WL 103157 (W.D. Pa. 1998). At best, therefore, Columbia's challenges to the accuracy of Leitzinger's averaged undercharge (*i.e.*, a 16.4% uniform undercharge during the conspiracy), under the circumstances of this case, was best left to cross-examination before the jury, from which the jury could make its own credibility and value judgments. Had McAnneny performed an independent analysis and opined that the relevant market actually was not well-functioning, thereby directly contesting – or at least substantially challenging – Leitzinger's conclusion on that point beyond a generic observation of some limited data, perhaps Columbia would have had a better argument.

2. Sufficiency of the Evidence – Injury and Damages

In so far as Leitzinger's testimony was admissible, it was a viable source of evidence on the issues of injury and damages. Though confused by voluminous *Daubert*-related arguments, Columbia's challenges to

the Plaintiffs' proofs on these issues is simply that the Plaintiffs failed to provide the jury with sufficient evidence to support the jury's finding of individual (*i.e.*, Named Plaintiff) and market-wide injury and damages. Having resolved the issue of whether Leitzinger's testimony was properly before the jury, at best, Columbia's argument boils down to the assertion that Leitzinger's testimony alone is insufficient for the jury to have found injury and damages. For the reasons briefly outlined below, the Court finds that the Plaintiffs presented sufficient evidence to support the jury's specific findings on these elements.[42]

There is no dispute among the parties that, in order to sustain their claims, the Plaintiffs had the burden at trial to present: (1) sufficient evidence of injury to the named Plaintiffs and the market as a whole; and (2) sufficient evidence that the named Plaintiffs and the market as a whole suffered measurable damages. Nor do the parties dispute that the named Plaintiffs generated (and sold) scrap to various dealer-Defendants during the conspiracy period. The principle evidence Plaintiffs presented on these issues was Leitzinger's testimony, though representatives of

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[42] In this regard, the jury specifically was instructed that, in order to find any Defendant liable, it had to find individual and market-wide injury. To that end, the Verdict Form (Doc. 636) presented a series of seven questions identifying the jury's unanimous agreement as to each of the findings it needed to make to support a finding of liability. As to Columbia, the jury responded in the affirmative as to each. It is undisputed, therefore, that the jury found individual and market-wide injury resulting from the conspiracy it found to have existed during the alleged conspiracy period. Based on the experts' competing views, then, it quantified that harm.

the named Plaintiff companies provided evidence of their respective sales volumes.

In sum, Leitzinger testified that, if a conspiracy to depress prices *via* customer allocation existed during the alleged period, it would have uniformly impacted the relevant scrap metal market, and that impact would have been one that was shared in common by all of the ferrous generators.[43] He went on to testify that the uniform injury experienced by all of the ferrous class members was a 16.4% undercharge during the conspiracy period. Further, Leitzinger testified that the undercharge experienced by the named Plaintiffs specifically was 16.4% as well.[44]

As evidenced by the fact that most of its Reply Brief is dedicated to *Daubert* issues, Columbia's sufficiency challenges here are essentially *contingent* on Leitzinger's testimony being deemed inadmissible. For example, Columbia states:

> . . . there is no basis in law or economics for accepting Dr. Leitzinger's averaging methodology. If that methodology is rejected by the Court, as it must be, there is no evidence whatsoever concerning the impact of the alleged conspiracy on either Lincoln Electric or Profile Grinding.

Doc. 658 at 12 (emphasis added). If admissible, and credited by the jury (even if only in part), the thrust of

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[43] Tr. at 847.

[44] Tr. at 1024.

Columbia's arguments wither. "It is well-established that proving antitrust injury should not be unduly rigorous." *Schwartz v. Sun Co., Inc.*, 276 F.3d 900 (6th Cir. 2002). Though not in the form of specific transaction-related evidence relative to the named Plaintiffs themselves, the Plaintiffs clearly presented evidence of injury and damages on behalf of the named Plaintiffs specifically and the class members generally. On this point, Columbia argues that, at least, the Plaintiffs should have been obligated to provide transaction-based evidence from the named Plaintiffs to demonstrate their individualized injuries and damages during the conspiracy period. While there is a facial logic to this demand, it is ultimately belied by Leitzinger's testimony.

Leitzinger unambiguously testified that the named Plaintiffs were injured, and that they were damaged *via* a 16% undercharge. He further explained, that, while his analyses of the 69 companies in his sample group did not yield perfectly accurate generator-by-generator undercharge figures, those raw figures contained inadvertent errors, which he could not verify (much less correct) because he had only limited electronic data and no actual invoices that could be used to cross-reference the data.[45] For this very reason, he testified that "averaging" was necessary to identify the actual uniform damage every Plaintiff suffered. Accordingly, even had Leitzinger

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[45] Leitzinger explained that data of this type commonly has errors in it that originate with the provider of the data. For example, he explained that – given that the data used was electronic (which made its use practical) – various figures likely were transposed or otherwise incorrectly inputted, thereby *mildly* impacting the data's accuracy.

done independent analyses of the named Plaintiffs' transactions, he would not have testified that their results identified those Plaintiffs' damages. Pursuant to his methodology, therefore, Leitzinger was the only source of the very evidence Columbia claims is insufficient – *i.e.*, the average undercharge figure. *See Paper Systems, Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601 (E.D. Wis. 2000) (econometric method of determining average overcharge "promises to provide precisely the kind of single mathematical formula which can establish each class member's damages" despite the expert's concession that the actual overcharge varied between class members).

If credited, therefore, Leitzinger's testimony clearly established evidence of injury to the named Plaintiffs and the class as a whole, and measurable damages to the named Plaintiffs and the class as a whole. Under the circumstances of this case, despite its weaknesses, the Court deems Leitzinger's testimony sufficient to satisfy the Plaintiffs' burdens of proof under Rule 50. If the jury credited Leitzinger's conclusions – in whole or in part – it reasonably could have reached the conclusions that it did. For these reasons, Columbia's motion for judgment as a matter of law and for a new trial cannot be granted on these bases.[46]

The Court makes one final observation regarding the nature and strength of Leitzinger's testimony. As

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[46] Again, it is not this Court's role to decide whether it finds room to criticize Leitzinger's testimony, or even whether it could have rendered a verdict in favor of Plaintiffs on the strength of that testimony; the only question is whether the evidence would allow reasonable minds to reach such a verdict, after drawing all reasonable inferences from that evidence in Plaintiffs' favor.

noted, the Court spent a substantial period of time analyzing, and re-analyzing, the Defendants' *Daubert* motions seeking to exclude Leitzinger's testimony in its entirety. The Court felt that Defendants' challenges were substantial and written attacks on his testimony articulately stated. It was only after several passes through the motion papers that the Court was able to understand that those challenges, though pointed, went to the weight and not the admissibility of Leitzinger's opinions – *i.e.*, did not justify the wholesale exclusion of testimony Defendants sought.

The Court finds it notable that, after hearing Leitzinger's testimony in open court, hearing his responses to counsel's pointed attacks on cross-examination, and hearing what ultimately proved to be only limited critiques of Leitzinger's analysis by McAnneny, the Court was *more* convinced that it had been when it made its initial *Daubert* ruling that its ruling was correct. In other words,. Defendants' predictions regarding Leitzinger's testimony and the attacks they planned to levy on it, through cross-examination and McAnneny's testimony, were overstated. As it actually played out in Court, it became clear that Leitzinger's testimony was less susceptible to attack than Defendants originally claimed and that McAnneny himself would provide Defendants far less fodder for that attack than they predicted. Ultimately, the debate over Leitzinger's testimony was left where it should have remained – with the jury.

C. Motion for New Trial – Rule 59(a)[47]

Columbia's motion for a new trial presents 19 bases for its argument that it is entitled to a new trial and/or a reduction of the judgment. For the reasons outlined above, the Court need not address many of these arguments – namely, arguments 4, 5, 10, 11, 15, 16, 17, 18 and 19. Arguments 1, 2, 3, 8, 9 and 13, which simply mirror the arguments raised in Columbia's motion for judgment as a matter of law, fail for the reasons outlined *supra* and, therefore, do not warrant additional consideration here. Accordingly, the Court's substantive analysis of Columbia's motion for a new trial is limited to Columbia's 6th, 7th and 14th arguments in that motion.

1. Legal Standard for Rule 59(a)

Pursuant to Rule 59(a), the Court is empowered to grant a new trial. Fed. R. Civ. P. 59(a). In contrast to judgment as a matter of law, "[t]he authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court." *Williamson v. Owens-Illinois, Inc.*, 787 F.2d 594, 1986 WL 16533 at *3 (6th Cir. 1986) (quoting 11 Wright & Miller, Federal Practice and Procedure, §2806 (1973)). When reviewing a motion for a new trial, a court "should indulge all presumptions in favor of the validity of the jury's verdict." *Brooks v. Toyotomi Co.*, 86 F.3d 582, 588 (6th Cir. 1996) (citing *Ragnar Benson, Inc. v.*

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[47] Columbia references Rule 59(b) in its motion (Doc. 646 at 1), which is merely directed toward the time frame within which a party must file a motion for a new trial. The Court views Columbia's motion for a new trial as having been appropriately filed under Rule 59(a).

Kassab, 325 F.2d 591, 594 (3rd Cir. 1963)). A jury verdict must be upheld so long as there is any competent and substantial evidence in the record to support it, even if contradictory evidence was presented. *Green v. Francis*, 705 F.2d 846, 849 (6th Cir. 1983).

A motion for a new trial should be denied "if the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable." *J.C. Wyckoff & Assoc., Inc. v. Standard Fire Ins., Co.*, 936 F.2d 1474, 1487 (6th Cir. 1991); *see also Brooks v. Toyotomi Co.*, 86 F.3d 582, 588 (6th Cir. 1996) (conflicting evidence, standing alone, "is not sufficient to justify overturning the jury's verdict"). The simple fact that "the grant of a new trial might result in a different outcome is not a valid ground for disturbing a jury's verdict which is otherwise based upon legally sufficient evidence." *Brooks*, 86 F.3d at 588 (citation omitted). The "true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred." *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).[48] A court also may grant a new trial based on a prejudicial error of law. *Klein v. Hollings*, 992 F.2d 1285 (3d Cir. 1993).

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[48] The Third Circuit has gone so far as to state that a court should grant a new trial "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Williamson v. Conrail*, 926 F.2d 1344 (3d Cir. 1991).

Accordingly, a district court "must compare the opposing proofs, weigh the evidence, and set aside the verdict only if it determines that the verdict is against the clear weight of the evidence." *McDonald v. Petree*, 409 F.3d 724 (6th Cir. 2005). "Thus, on a motion for a new trial, as contrasted with a motion for [judgment as a matter of law], the judge may set aside the verdict even though there exists substantial evidence to support it." *Id.* However, the district court "should refrain from interfering with a jury's verdict unless it is clear that the jury reached a seriously erroneous result." *Brooks*, 86 F.3d at 588. The Sixth Circuit has explained that a "seriously erroneous result" should be evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion – *i.e.*, the proceedings having been influenced by prejudice or bias. *Holmes v. City of Massillon*, 78 F.3d 1041 (6th Cir. 1996).

In deciding whether to grant a new trial on the basis of prejudice through judicial error, courts consider each argument under the umbrella of Rule 61, which states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceeding

> which does not affect the substantial rights of the parties.

Fed. Civ. R. 61 (emphasis added). Accordingly, a party seeking a new trial under Rule 59(e) must show two things. As a preliminary matter, it must show that the Court actually acted erroneously. Then, once error has been established, it must show that the error prejudiced the proceedings in a substantive way.

2. Discussion of Rule 59(a) Motion

For the reasons outlined above, the Court's substantive analysis of Columbia's Rule 59(b) motion is limited to arguments 6, 7 and 14 in that motion. Those arguments are addressed to: (1) the Court's refusal to decertify the Plaintiff Class on the eve of trial; (2) the Court's statute of limitations jury instruction; and (3) the Court's decision not to allow Columbia to present evidence that it was neither charged with, nor convicted of, any criminal conduct. The Court addresses each in turn.

a. The Court's Refusal to Decertify the Plaintiff Class on the Eve of Trial (Argument 6)

Columbia briefly[49] argues that it is entitled to a new trial because the Court denied its motion to decertify the Plaintiff Class. In sum, Columbia simply

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[49] As with the bulk of Columbia's arguments in support of its request for a new trial, Columbia raises the decertification issue in its motion, but does not outline in any detail the substance of its position -- neither in the motion, nor the Reply Brief.

reiterates, though more briefly, the argument presented in its pre-trial motion on that issue (Doc. 584).[50] For the same reasons the Court denied Columbia's motion in the first instance, the Court likewise denies its request for a new trial. The Court briefly outlines its decision because it did not have an opportunity to do so previously.

On January 20, 2006, four days before the trial in this case was set to begin, Columbia requested that the Court decertify the Plaintiff Class – and require the two named Plaintiffs to proceed on their own – because it believed that the Plaintiffs had failed adequately to provide notice to the absent class members that the verdict and judgment in this case would be binding upon them.[51] Despite any potential merit Columbia's argument *may* have had if timely asserted, Columbia's motion came far too late in the process to warrant substantive consideration by the Court.

Accordingly, as outlined by the Court on January 24, 2006, Columbia's request to decertify the Plaintiff Class literally on the eve of trial was inappropriate

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[50] Columbia's motion for a new trial also charges that the Court should have decertified the class – per its motion – because the Plaintiffs had no evidence of injury to the nonferrous generators. Columbia's motion to decertify, however, did not present that argument as a basis for decertification. Rather, Columbia's motion only argued that decertification was required due to deficiencies in the notice provided to the class. In so far as this additional issue was not previously raised, and the Court finds it without merit in any event, the Court does not address it here.

[51] Columbia's motion was directed toward the nonferrous class members, who stood to recover nothing from the present case except a likely adverse judgment.

and untimely. Columbia's explanation for filing its motion on the eve of trial is that it did not "think of" the notice issue until the Bluestar settlement occurred. Regardless of the Bluestar settlement, however, Columbia was obliged to consider and evaluate the notice issue long before the week of trial. Indeed, Columbia had ample opportunities to raise this issue including, but not limited to, in a dispositive motion.[52]

As opposed to its purported concern that an unsuspecting absent class member would be harmed by virtue of a verdict and judgment being binding against him, Plaintiffs theorized that it was likely that Columbia's last-minute decision to file its motion related more to a desire to disrupt the Plaintiffs' trail preparations. Whatever the reason, Columbia's woefully belated decertification motion was properly denied and, therefore, cannot serve as a basis for a new trial.

b. Statute of Limitations Jury Instruction (Argument 7)

In addition to its argument that the Plaintiffs have provided insufficient evidence that Columbia was a member of the conspiracy during the statute of limitations period (outlined and addressed above), Columbia also argues that the Court erroneously

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[52] Columbia objected neither to class certification, nor the attendant notices that were sent to the Plaintiff generators, a process that occurred in late 2003 and early 2004. Nor did Columbia object to the notice that had been provided after Dr. Leitzinger's report was produced.

instructed the jury[53] as to the critical date "on or after which" Columbia must have participated in the conspiracy – *i.e.*, March of 1996.[54] On this ground, Columbia seeks a new trial.

Refusing to acknowledge the possibility of statutory tolling under 15 U.S.C. § 16(i), Columbia's proposed jury instruction on the statute of limitations issue identified August 15, 1998 as the critical date "on or after which" the Plaintiffs had to establish Columbia's participation in the alleged conspiracy.[55] Following briefing and argument on the issue, however, the Court concluded that § 16(i) tolled the statute of limitations. That section provides:

> (i) Suspension of limitations
>
> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under Section 15a of this title, the running of the statute of limitations in respect to every private or State right of action arising under

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[53] The statute of limitations instruction appears at page 43 in the Court's *Jury Instructions* (Doc. 631).

[54] Though they dispute the "critical date," the parties do not dispute that a 4-year statute of limitations period applies.

[55] In reaching this date, Columbia generically applied the 4-year limitations period to the filing date of this case against it – *i.e.*, August 15, 2002. *See* Doc. 571 at Proposed Instruction #50 (p. 93 of 109). Columbia did not take into account any tolling – statutory or otherwise – because it argued that no tolling was appropriate.

> said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, that whenever the running of the statute of limitations in respect of a cause of action arising under Section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. (Emphasis added)

Based on the government's initiation of formal proceedings against former-Defendant Bay Metals in March of 2000, as well as the various other proceedings instituted against various other scrap dealers in the years that followed, the Court concluded that statutory tolling under § 16(i) began in March of 2000 and continued at least until August of 2002 when this case was filed. Accordingly, the Court set March of 1996 as the critical date for statute of limitations purposes – *i.e.*, 4 years earlier.[56]

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[56] On this issue, the Plaintiffs argued that the government's initiation of an investigation into the scrap metal industry was sufficient to trigger tolling under § 16(i) and that formal proceedings (*via* information or indictment) were not necessary. *See* Doc. 617. Were that the case, tolling would have started much earlier than March of 2000, when the first formal proceeding began against Bay Metal. Based on substantial independent research on this issue, the Court concluded that a governmental investigation was insufficient. Columbia cannot argue, therefore, that it was met with resistence at every turn. Clearly, the Court's independent research on this issue inured to Columbia's benefit and made it much more difficult for Plaintiffs to prevail on its claims against Columbia.

Columbia attacks the Court's application of § 16(i) in two respects. First, Columbia argues that the government's suit against Bay Metals did not activate tolling under § 16(i) because Columbia was not a defendant in that case, and the allegations in that case were different from the allegations in this case. Second, even assuming that tolling under § 16(i) is appropriate *vis-a-vis* the Bay Metals case, because that case ended in June of 2000, Columbia argues that tolling would have continued only until June of 2001 per § 16(i)'s one-year trailer period following the conclusion of governmental proceedings. Columbia argues, therefore, that the 14-months between June of 2001 and August of 2002 (when Plaintiffs filed this case) must count against the statute of limitations period. As such, Columbia alternatively argues that the Court, at most, only should have looked back 2 years and 10 months – *i.e.*, 4 years minus 14 months – from March of 2000, instead of a full 4 years. Columbia contends, therefore, that the earliest possible critical date "on or after which" the Plaintiffs had to establish Columbia's participation in the alleged conspiracy was May of 1997 (*i.e.*, 2 years and 10 months before March of 2000) and not March of 1996.

Though Columbia does articulate its position on this issue, that position is no different from the one it took at trial. As at trial, Columbia fails to cite any legal authority in support of its position.

While the Court agreed with Columbia's trial argument that more than a government investigation is needed to activate § 16(i), it does not agree that the allegations in a prior government proceeding must be identical to a subsequent civil case for § 16(i) to apply. Nor does the Court agree that § 16(i) requires that

Columbia have been a defendant in the prior governmental proceeding. Such is not the law. Indeed, in *Leh v. General Petroleum Corporation*, 382 U.S. 54, 59 (1966), the Supreme Court addressed this very issue stating that a "private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants."[57] Accordingly, simply because the conspiracy alleged in this case *may* differ slightly from the conspiracy alleged in the Bay Metals case, and because Columbia was not a named defendant in that case, does not automatically prevent § 16(i)'s application. Because the Court finds the government's allegations against Bay Metals to be substantially similar to the Plaintiffs' allegations here, and because it finds that the government alleged facts relating to a market-wide scrap metal conspiracy, the Court concludes that tolling is appropriate under 15 U.S.C. § 16(i) as of March 2000.

With regard to Columbia's secondary argument that, assuming it was appropriate, the tolling from the Bay Metals case ceased in June of 2001, Plaintiffs accurately point out that the Bay Metals case was

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[57] *See also, Zenith Radio Corp., v. Hazeltine Research, Inc.*, 401 U.S. 321, 337-38 (1971) ("[A] private party who brings suit for a conspiracy against which the Government has already brought suit is undeniably basing its claim in whole or in part upon the matter complained of in the Government suit, even if the defendant named in the private suit was named neither as a defendant nor as a coconspirator by the Government); and *Philip Morris, Inc. v. Heinrich*, 1996 U.S. Dist. LEXIS 9156 at 33-34 (S.D.N.Y. June 28, 1996) (the statute of limitations is tolled as to all defendants by Government's filing of a criminal information against one defendant regarding the same conspiracy).

simply the first of several actions brought by the government relating to bid-rigging in the scrap industry in Northeastern Ohio, each of which implicated § 16(i) for the same reason the Bay Metals case did. As the Plaintiffs point out, the statute of limitations, once tolled by government action under § 16(i), remains tolled until the last action against all defendants is resolved.[58] Columbia fails even to respond to this argument in its Reply Brief.

For these reasons, the Court rejects Columbia's unsupported view that the Court's statute of limitations instruction was erroneous. Columbia, therefore, is not entitled to a new trial on that ground.

c. Columbia Was Not Permitted to Present Evidence that it was Neither Charged nor Convicted of Criminal Conduct (Argument 14)

Columbia argues that, because the Court prohibited it from presenting direct evidence that it was neither charged nor convicted of any criminal conduct, it is entitled to a new trial because it was prevented from: (1) rebutting Plaintiffs' guilt-by-association theme; and (2) effectively attacking Dr. Leitzinger's use of transaction data from convicted felons. As an initial matter, Columbia's characterization of the Court's limitation of Columbia's presentation of evidence (or argument) to the jury is incorrect.

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[58] *Cf. Marine Firemen's Union v. Owens-Corning Fiberglass Corp.*, 503 F.2d 246, 249 (9th Cir. 1974); and *New Jersey v. Morton Salt Co.*, 387 F.2d 94, 99 (3d Cir. 1967).

This issue initially was addressed in a motion in limine, which the Court granted in part and denied in part. In a written pre-trial order, the Court explained that:

> Defendants are not permitted initially to argue, or otherwise mention, that they were not prosecuted criminally for alleged antitrust violations. Upon request by the Defendants *after* the Plaintiffs' presentation of proofs, however, such argument *may* be permitted if the Court determines that fairness so requires.

Doc. 583 at 2 (emphasis in original). Despite the Court's solicitation, Columbia never sought permission later to present evidence, or otherwise argue, that it had never been charged or convicted of anything. Accordingly, Columbia waived this issue by failing to pursue it, as ordered by the Court. For this reason alone, Columbia's argument that the Court's limitation warrants the extraordinary remedy of a new trial fails.

In any event, identifying each of them by name, Columbia's counsel emphasized in his opening argument that most, if not all, of the other alleged conspirators had been charged and/or convicted of criminal activity. *See* Tr. at 79-80. Obviously, Columbia was not included in that narrative, thereby providing the clear negative implication that the government had not pursued Columbia criminally. Though only through argument, Columbia made its point to the jury in any event.

A review of the trial transcript leaves no doubt, moreover that the jury was fully aware that the data upon which Dr. Leitzinger relied had been provided by

"convicted felons." Indeed, counsel for both Columbia and DeMilta argued this point vigorously when they asked the jury to disregard all evidence from the alleged co-conspirators on grounds that it was tainted – either by their alleged criminality or by their motive to ingratiate themselves with the government by aiding the victims of their criminal conduct in the victim's civil action.

These bases notwithstanding, Columbia presents no legal support for the proposition that it should have been permitted – under any circumstances – to present evidence that the government had neither charged nor convicted it of criminal activity. This deficiency, along with the fact that the government may elect not to pursue a target for a variety of reasons other than the belief that the target is innocent, supports the Court's discretionary decision not to permit Columbia to present evidence of governmental inaction. Further, as noted by the Court during the trial, the government's inaction to date may be just that, inaction to date. For all these reasons, Columbia's request for a new trial on this ground is rejected.

D. Motion to Amend Judgment – Rule 59(e) (Remittitur)

In the alternative, Columbia requests that the Court reduce the present judgment to $1,914,658, which is the figure presented by Dr. McAnneny based on his "corrected" application of Leitzinger's methodology. For the reasons briefly stated below, Columbia's alternative motion must be denied.

1. Legal Standard for Rule 59(e)

As a general rule, the Sixth Circuit has held that "a jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *American Trim, LLC v. Oracle Corp.*, 383 F.3d 462, 475 (6th Cir. 2004) (quoting *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391 (6th Cir. 1990). A trial court is within its discretion in remitting a verdict "only when, after reviewing all the evidence in the light most favorable to the prevailing party, it is convinced that the verdict is clearly excessive; resulted from passion, bias, or prejudice; or is so excessive or inadequate as to shock the conscience of the court." *Id.* (Emphasis added). "If there is any credible evidence to support a verdict, it should not be set aside." *Id.*

2. Discussion of Rule 59(e) Motion

In sum, Columbia argues that the jury's verdict is necessarily flawed – and warrants reduction – because it does not adopt either of the parties' experts' *exact* damages calculations. The essence of this argument, therefore, is not that the verdict was excessive, but that it was not exact. To that end, Columbia cites *Gregory v. Shelby County, Tenn.*, 220 F.3d 433 (6th Cir. 2000), for the general proposition that a "remittitur is available where, as here, an award is not supportable by the proof." *See* Doc. 646 at 8. While that general proposition is certainly not inaccurate, it does not detract from the Sixth Circuit's more focused, and well-settled, view that remittitur of a jury's verdict is only permissible when the verdict is clearly excessive. In determining "excessiveness," this Court

must: (1) evaluate all of the evidence in a light most favorable to the Plaintiffs; and (2) conclude that the jury's verdict resulted from passion, bias or prejudice – or is simply so excessive that it shock's the Court's conscience.

Columbia has presented no argument on these points, or otherwise argued that the jury's verdict was excessive. Rather, it has simply asserted the conclusory view that, because the jury did not adopt one of the two expert's competing (and very different) figures, its verdict cannot stand. The verdict did not exceed Plaintiffs' estimate, nor did it exceed an amount upon which a reasonable jury could have agreed based on the evidence presented. In this regard, the Sixth Circuit has recognized that Plaintiffs need not establish their damages in a concrete fashion, reasonable estimations are permitted:

> Because damages issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts, the Supreme Court has repeatedly held that in the absence of more precise proof, the factfinder "may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendencies to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

Schwartz v. Sun co., Inc., 276 F.3d 900, 904 (6th Cir. 2002) (internal citation omitted).[59] Here, in quantifying that harm the jury clearly found to have occurred, it was faced with two competing experts, one of whom – Dr. McAnneny – was not hired to do an independent analysis, but only to evaluate the analysis performed by the other. Though admissible, Columbia's counsel and its expert masterfully highlighted the weaknesses in Leitzinger's application of his methodology, but did not directly challenge the methodology itself. That said, McAnneny challenged Leitzinger's calculations in several respects, any one of which the jury selectively could have credited. Equally, the jury was free to credit one or more of Leitzinger's assumptions and, given the volume of data contained in the trial exhibits (which included transactional data), reach a reasonable estimate based on those credited portions of each experts' testimony.

Accordingly, sufficient evidence exists in the record to justify the jury's reasonable estimation of the damages they clearly determined to have occurred. As such, the damages figure the jury returned cannot be said to be excessive. The jury was clearly instructed on this area of the law. For these reasons, and especially in light of the Court's conclusions relative to Columbia's motions for judgment as a matter of law and for a new trial, the jury's verdict must stand.

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[59] *See also In re Industrial Silicon Antitrust Litigation*, 1998 WL 103157 (W.D. Pa. 1998) ("an antitrust plaintiff need not prove damages with mathematical certainty, but rather, he need only introduce sufficient evidence of damages to allow a jury to estimate the amount of damages . . . [o]nce causation of damages is determined . . . the actual amount of damages may result from a reasonable estimate") (internal quotations omitted).

III. CONCLUSION

For the foregoing reasons, *Columbia Iron and Metal Company's Renewed Motion for Judgment as a Matter of Law* (Doc. 645) is **DENIED**; *Columbia Iron and Metal Company's Renewed Motion for New Trial or Amendment of Judgment* (Doc. 646) is **DENIED**.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated: September 30, 2006

Supreme Court, U.S.
FILED
MAR 5 - 2009
OFFICE OF THE CLERK

(3)

No. 08-934

In The Supreme Court of the United States

COLUMBIA IRON & METAL CO.,
Petitioner,

v.

LINCOLN ELECTRIC COMPANY, AND PROFILE GRINDING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE STATUTE OF LIMITATIONS ISSUE 1

A. The Statutory Tolling Instruction Was Clearly Erroneous 1

B. The Error Was Prejudicial 2

C. Statutory Tolling Is a Common Problem . 7

II. THE CLASS NOTICE ISSUE 7

III. THE CLASS JUDGMENT ISSUE 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

California v. Roy,
519 U.S. 2(1997) 6

Hedgpeth v. Pulido,
129 S. Ct. 530 (2008) 2

Neder v. United States,
527 U.S. 1 (1999) 3, 6

O'Neal v. McAninch,
513 U.S. 432 (1995) 6

Stromberg v. California,
283 U.S. 359 (1931) 2, 3

Yates v. United States,
354 U.S. 298 (1957) 2, 3

STATUTES

15 U.S.C. §16i 7

RULES

Fed. R. Civ. P. 23 . . . . . 8, 10
Fed. R. Civ. P. 23(b)(3) 8, 10
Fed. R. Civ. P. 23(c) 8
Fed. R. Civ. P. 23(c)(2) 10
Fed. R. Civ. P. 23(c)(2)(B) 8, 9, 10
Fed. R. Civ. P. 23(c)(3)(B) 10
Fed. R. Civ. P. 23(e) 10

TEXT

American Bar Association Section of Antitrust Law, Antitrust Trial Practice (Winter 2009) . . 7

INTRODUCTION

Respondents' Brief in Opposition argues that two issues arising in every antitrust class action following a government cartel prosecution should be treated as inconsequential. Their views that the harmless error doctrine can tolerate an instruction expanding the statutory limitations period, and that compliance with the mandated contents of a class notice is a quibble, reveal the need for the Court to impose orderly standards on cases with enormous financial consequences.

I. THE STATUTE OF LIMITATIONS ISSUE.

A. The Statutory Tolling Instruction Was Clearly Erroneous.

Respondents attempt in two brief sentences what the Sixth Circuit consciously avoided, namely to argue that "the underlying [statutory tolling] instruction was ... correct." (Br. in Opposition at 21-22.) They point to the fact that the government investigation led to multiple criminal cases, but they cannot show that any of them qualified for statutory tolling.

Respondents imply that petitioner somehow conceded the relevance of several government cases by showing the trial court a series of different possible tolling dates. What they fail to explain is that no criminal case was filed against petitioner, and no criminal case alleged the same industry-wide conspiracy alleged in the class complaint. Therefore, petitioner simply explained to the trial court that a proper tolling analysis required two steps: (1) to determine whether any of the criminal cases had

sufficient factual links to this case to toll the civil statute of limitations against petitioner and, *if so*, (2) to toll from the commencement of that case. Different time periods were provided only as illustrations of arguable dates to demonstrate to the trial court that it was making a clear error because there was *no* lawful way, using *any* arguably eligible case, to reach back as far as March 1996. There had been no other government case against anyone, and no civil case against petitioner, filed within the one year statutory deadline after the conclusion of the government case filed in March 2000.

B. The Error Was Prejudicial.

With no sound argument on the merits of the instruction imposing excessive statutory tolling, respondents place heavy reliance upon *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008), for the proposition that harmless error review applies to that erroneous jury instruction. That point, however, is a red herring, for the application of harmless error analysis has never been in dispute.

Pulido adds nothing to the different and much more precise issue presented by the petition, namely whether an instructional error on which the jury probably depended can be entirely ignored if it is merely possible that the jury could have followed a different instruction. It is this point on which *Stromberg v. California*, 283 U.S. 359 (1931), and *Yates v. United States*, 354 U.S. 298 (1957), turned. *Pulido* did not alter the *Stromberg* and *Yates* holding. Indeed, the *per curiam Pulido* opinion makes it clear that "neither *Stromberg* nor *Yates* had reason to address whether the instructional errors they

identified could be reviewed for harmlessness, or instead required automatic reversal." The principle of *Stromberg* and *Yates* remains valid and important: when there are alternative-theory instructions, one legally acceptable and one not, but it is impossible to know from the record and the verdict whether the jury followed one or the other, then the verdict cannot be affirmed unless the incorrect instruction was itself harmless.

The Court's decision in *Neder v. United States*, 527 U.S. 1 (1999) (cited in *Pulido*), provided a clear statement of the harmless error question in the face of an erroneous instruction: "whether the jury verdict would have been the same absent the error." *Id.* at 19. In this case there is no way to determine that the error was not the sole basis for the judgment entered against the petitioner. The record in this case strongly suggests, as petitioner previously explained (Pet. at 6, 13), that the damages found by the jury were reflective only of the erroneous instruction and that the jury did not regard the fraudulent concealment contention as at all persuasive. The period subsequent to March 2000, which aligns perfectly with the verdict's damages, was the subject of just the statutory tolling instruction which was wrong.

The court of appeals did *not* hold that the verdict was clearly uninfected by the challenged instruction. Nor did it conclude that the verdict "*would have* been the same" with a correct instruction on statutory tolling. Instead, the court contented itself with the view that, "[b]ecause we conclude that the jury *could have* reached the verdict based on the fraudulent concealment theory, we do not reach Columbia's objection to the statutory tolling instruction." (Pet.

App. at 32, emphasis added.) If mere remote possibility of the same result is all that is required, the harmless error standard has been reduced to pure speculation about how a jury with a different but correct understanding of the law might respond. A clear error that probably caused a verdict, which changed the result of a trial, would henceforth be immaterial if a different jury "could" view the evidence on a different instruction as more material and persuasive.

The reliance by the court of appeals upon a second instruction to finesse the statutory tolling error was inappropriate for several reasons. Not only was the verdict logically linked by a simple and transparent calculation to the evidence wholly within the time period established by statutory tolling beginning in March 2000 (so that the normal four years limitation would go back to March 1996), the fraudulent concealment instruction was not provided to the jury as a substitute for statutory tolling. It was not an alternative basis for damages. Rather, fraudulent concealment was explicitly stated as a possible supplement to permit earlier years to be added to the base damages calculation that was stated to be unavoidable: "If you find that plaintiffs have failed to prove any one of these elements [of fraudulent concealment], then you are limited to the post-March 1996 time period outlined in the previous [statutory tolling] 'affirmative defense' instruction." (Jury Instruction, emphasis in original.) Thus, the jury was required to include all of the period after March 1996 in its damages calculation, even if the jury rejected the evidence on fraudulent concealment. Evidence of fraudulent concealment was merely an opportunity to find further damages before March 1996.

There is no reason to believe that the jury credited plaintiffs' arguments and indulged that invitation to go to an earlier period. The amount of the verdict perfectly matches plaintiffs' own damages evidence for the period running from March 1996 to the end of the conspiracy. Respondents do not dispute that stark reality. When the court of appeals stated that "the jury heard evidence upon which it could have found fraudulent concealment even *before* 1996" there is no reason at all to conclude that is what the jury did. Nor is there any evidentiary basis to say that damages before 1996 would have generated the same verdict. Neither respondents nor the court of appeals ever identified any apparent link between the verdict amount and damages for prior years.

Respondents do not dispute the clear parallel between the post-March 1996 period (established by the trial court as a matter of law) and the verdict. The most they have said is that "no witness testified to the amount of damages computed on an annual basis and testified to the amount of damages estimated for the post-1996 time period." There was, however, no need for the jury to recall such focused testimony to implement the statutory tolling instruction without reference to fraudulent concealment. They had the numbers right in their hands. One of the few trial exhibits on damages was the summary prepared by plaintiffs' expert which set forth his "damages computed on an annual basis" for each year from 1996 until the end of the conspiracy. (P.Ex. 521.)

Respondents leap from the statement by the court of appeals concerning the pre-1996 period to argue a non-sequitur that "any error in the statute of limitations instruction would be wholly immaterial if

the jury found fraudulent concealment *beginning* in 1996." (Br. in Opposition at 187, emphasis in original.) They completely overlook the fact that *no* instruction directed the jury to consider fraudulent concealment beginning in 1996. It would be wholly speculative to assume they did so on an uninstructed frolic. Indeed, there was no reason for them even to contemplate that idea since the trial court had already locked in all damages beginning in 1996 with its erroneous instruction. Respondents argue for harmless error in one instruction because it may have been hypothetically possible (but not certain) for a jury to reach the same verdict if it had received an omitted instruction. There is simply no way to conclude, in this Court's words, that "the jury verdict would have been the same absent the error." *Neder*, *supra*.

This record, therefore, squarely presents a case where there must be "grave doubt as to the harmlessness of the error." *California v. Roy*, 519 U.S. 2(1997); *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). If the jury did, indeed, conclude that it should award damages only for the minimum period required by the court, the court's incorrect increase in that time period had the consequence of generating a calculation that, when trebled, exceeded the amounts obtained by the class from prior settlements. It was that difference in time periods which converted the judgment from one which would provide no trial recovery for the class to one creating a net award of over $23 million plus fees and expenses. That demonstration of prejudice was expressly and extensively argued by petitioner.

C. Statutory Tolling Is a Common Problem.

The application of statutory tolling to a private antitrust cartel case is ubiquitous. As the American Bar Association Section of Antitrust Law observed about this petition in Antitrust Trial Practice at 16 (Winter 2009), "[i]n this respect, Columbia raises an important issue."

Virtually every government indictment or information is followed by treble damages class actions where the period of time eligible for the damages claim sets the parameters for the litigation, whether it is eventually resolved by settlement or trial. It has become routine for a grand jury investigation to occupy multiple successive grand juries, thereby stretching an initial period from the previously customary 18 months to several years with long gaps between criminal charges against various subjects of the investigation.

While courts have construed the antitrust tolling statute (15 U.S.C. §16i) to suspend the limitations period during the entire course of overlapping criminal cases, no court has purported to revive tolling from a first government case when a second case was not filed within one year from the end of the first case. Not only would such a practice violate the terms of the statute (any delayed private action "shall be forever barred"), but extended tolling would by definition expand the limitations period by more than 12 months at a minimum.

II. THE CLASS NOTICE ISSUE.

Class procedures may be used to facilitate damages claims by large groups of similarly situated claimants

where common questions of law or fact predominate. Nonetheless, the convenience of a single proceeding requires protection of the rights of absent class members and assurance to a defendant that a class judgment will provide finality against all class members. The technique prescribed by Rule 23 to secure all of those interests is easy but critical: a clear and concise notice to the class of the seven essential features of a Rule 23(b)(3) action "in plain, easily understood language." When one of those features -- arguably the most fundamental and with the greatest ultimate consequences -- is entirely omitted from a notice, the due process function of the class notice has been compromised. This principle is confronted in every Rule 23(b)(3) class action.

Respondents characterize the failure of the class notice to include a mandatory provision - - "the binding effect of a class judgment" - - as a "quibble" that is "trivial." They then defend the notice on the ground that it "was issued without objection." These arguments reflect a disdain for the due process requirements underlying Rule 23(c) and the obligation imposed on the trial court by Rule 23(c)(2)(B) to be sure its notice is proper. They also misrepresent the circumstances of the case and how it reflects problems frequently arising in complex class action damages litigation.

There is no question that the binding effect of a class judgment was not set forth in the only notice ever provided to the class. Respondents naturally endorse the view of the court of appeals that respondents' own drafting error should be overlooked because the notice provided different information from which a class member familiar with litigation could infer that he

would be bound. If an argument that an alert and perceptive class member could read between the lines to comprehend what was omitted is credited, the mandate for "plain, easily understood language" is mocked. The ability of absent class members without legal training or class action experience to make informed decisions about their claims will be forfeited.

Respondents' reliance on issuance of their form of notice "without objection" is deceptive. There was no objection because there was nothing objectionable about that notice for the function it was designed to perform at the time it was issued. As is often the case in multi-defendant antitrust litigation, the court had before it several early settlement agreements and class counsel eager to access those funds. The court reviewed the settlements preliminarily for fairness at a hearing noticed for that purpose. Plaintiffs made the point to the court at that time that non-settling defendants, such as petitioner, had no standing to object to those settlements. The court directed the notice at that hearing. This was a matter between the court, the class, the settling defendants and their counsel.

Rule 23(e) provides for a settlement notice in these circumstances. Instead of alerting all class members to the "binding effect of a class judgment" pursuant to Rule 23(c)(2)(B), a Rule 23(e) notice needs only inform the class that they stand to be "bound by the proposal." The notice is directed to the settlement terms, not to the consequences of later winning or losing a trial. There is no automatic link between a class member accepting the terms of a partial settlement with some defendants and the different decision to participate in subsequent litigation to a final judgment against non-

settling defendants. Accordingly, a Rule 23(e) settlement notice, even in a (b)(3) action, does not require the seven elements for a (c)(2)(B) notice.

The form of notice submitted to the court by respondents with the settlement agreements and approved at the settlement hearing was entirely proper for settlement purposes and was of no concern to the non-settling defendants, but that form of notice was not sufficient for later trial purposes.

III. THE CLASS JUDGMENT ISSUE.

Respondents do not dispute that the judgment failed to comply with the explicit requirement of Rule 23(c)(3)(B). They suggest that the trial court's "defect in the form of the judgment" -- a failure to identify "those to whom the Rule 23(c)(2) notice was directed" -- could be resolved by merely issuing "a corrected judgment." Their suggestion disregards the problem which made clerical correction impossible. The judgment provision of Rule 23 is interlinked with the notice provision. It is obvious that, when a notice did not comply with Rule 23(c)(2), a judgment cannot "include and specify or describe those to whom the Rule 23(c)(2) notice was directed."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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